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54
No. 15788

United States
Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division.

FILED
JAN 22 1958
FEDERAL BUREAU OF INVESTIGATION

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CITY OF ANCHORAGE, a Corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For the Appellant, City of Anchorage:

JAMES M. FITZGERALD,
City Attorney;

L. EUGENE WILLIAMS,
Assistant City Attorney,
Box 400, Anchorage, Alaska.

For the Appellee, Alaska Dairy Products:

MANDERS, BUTCHER, DUNN &
CONNOLLY;

JOHN C. DUNN,
First National Bank Bldg.,
Anchorage, Alaska.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297-C

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORP.,

Defendant.

COMPLAINT

Comes Now the City of Anchorage, plaintiff herein, and for cause of action against the defendant, alleges as follows:

I.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situated in the Third Judicial Division thereof.

II.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

III.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein

as if fully set forth. The defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and in consideration thereof the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

IV.

Plaintiff alleges that according to this contract said payment in lieu of taxes to be paid to the City was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

V.

Plaintiff alleges that the defendant has paid to the City, Six Hundred Fifty and 25/100 Dollars (\$650.25) which is a payment in lieu of real property taxes.

VI.

Plaintiff alleges that defendant's personal property has an assessed value of Forty-Six Thousand Dollars (\$46,000) on which amount the personal property taxes due the City would be in the amount of Four Hundred Sixty Dollars (\$460.00).

VII.

That one-half of the said sum of Four Hundred Sixty Dollars (\$460.00) became due and payable on or before the 15th day of February, 1956, and that if said first installment was not paid on said date the entire amount of tax became delinquent. That said

defendant did not pay the first one-half thereof by the date aforesaid, and that, therefore, the entire amount of tax became delinquent on the 16th day of February, 1956.

VIII.

That under the terms of said contract, defendant is indebted to plaintiff in the amount of Four Hundred Sixty Dollars (\$460.00).

IX.

That plaintiff has made demand on the defendant that the above amount be paid.

X.

Defendant has failed to pay the above amount as agreed to in the attached contract.

Wherefore, plaintiff prays for judgment against the defendant in the amount of Four Hundred Sixty Dollars (\$460.00); court costs incurred, attorney's fees, and for such other relief as to the court may seem equitable in the premises.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 11, 1956, U. S. Commissioner.

EXHIBIT A

Agreement
(Sewer Oustide City Limits)

This Agreement, made and entered into this 18th day of May, 1955, by and between the City of Anchorage, a municipal corporation, hereinafter referred to as the "City," and Alaska Dairy Products Corporation, hereinafter referred to as the "Owner";

Witnesseth:

1. The City will permit the owner to connect the property hereinafter described in Paragraph 2 of this agreement to the City sewer system under the conditions and provisions as set out herein.

2. The property, which the owner may connect to the City sewer system, is described as follows:

Lots 10, 11, Block 14A, East Addition to the City of Anchorage.

3. The owner will pay the City One Hundred Eighteen and 46/100 Dollars (\$118.46) as a hook-on fee. In addition to this hook-on fee, the owner will make annual payments in lieu of taxes to the City. Said payments in lieu of taxes to be equal to the total City levy, less the School District levy included therein. The payments, as provided in this section, shall be due when the City property taxes are due and collected in the same manner.

4. The owner shall install and maintain the sewer as provided in this agreement at his own expense,

and the City under no circumstances shall be liable for any debt contracted for the installation and maintenance of the sewer lines.

5. The City reserves the right to inspect the sewer installed as set forth herein at all times and may discontinue the rendering of said services upon failure to pay the amount as specified in Paragraph 3, or upon failure to perform any other condition as set out in this agreement.

6. The owner will submit plans for the sewer to the City Engineer for approval, prior to the installation, and shall perform all work in installing and maintaining the sewer system as set out in this agreement according to the specifications required by the Engineer.

7. Payment, as set out in this agreement, shall not preclude the City of Anchorage from levying special assessments for the installation and maintenance of sewer facilities, and owner agrees to said assessment as though the facilities herein provided did not exist.

8. The owner will secure approval from the Fairview Public Utility District for the installation of this sewer, before any work is commenced under the provisions of this agreement.

9. The covenants and conditions herein contained shall be binding upon the owner, his transferees, assignees, and successors in interests.

The word "owner" as used herein includes persons, firms and corporations, both plural and singular.

Dated at Anchorage, Alaska, the day and year first above written.

CITY OF ANCHORAGE,

By /s/ GEORGE C. SHANNON,
City Manager.

ALASKA DAIRY PRODUCTS
CORP.,

By /s/ GEORGE D. JACKSON,
Owner.

Executed in the presence of:

/s/ ELIZABETH KERBY,

/s/ ERNEST P. LaBATE.

United States of America,
Third Judicial Division,
Anchorage Recording Precinct,
Territory of Alaska—ss.

Before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned, qualified, and sworn as such Notary Public, this day personally appeared George C. Shannon, known to me personally to be the City Manager of the municipal corporation that executed the within instrument, and he acknowledged to me that the said instrument

was the voluntary act and deed of the said municipal corporation, and that his act of executing said instrument on behalf of said municipal corporation was duly authorized by ordinance/resolution passed by the City Council of said municipal corporation.

Witness my hand and Notarial Seal this 18th day of May, 1955.

[Seal]

ERNEST P. LaBATE,
Notary Public in and for
Alaska.

My commission expires: 5/18/57.

United States of America,
Third Judicial Division,
Anchorage Recording Precinct,
Territory of Alaska—ss.

Before the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned, qualified and sworn as such Notary Public, this day personally appeared, at Anchorage, Alaska, George D. Jackson, each/ to me personally known, and known to me to be the person described in and who executed the above instrument, and he/they and each of them, severally/ acknowledged to me that he/they and each of them, respectively/executed said instrument freely and voluntarily, with knowledge of its contents, for the uses and purposes therein mentioned.

Witness my hand and Notarial Seal this 18th day of May, 1955.

/s/ ERNEST P. LaBATE,
Notary Public in and for
Alaska.

My commission expires: 5/18/57.

[Duplicate agreement attached.]

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

ANSWER

Comes Now the defendant and answers the complaint of plaintiff herein in the manner following.

I.

Defendant admits the allegations set forth in paragraphs I to V, inclusive, of plaintiff's complaint.

II.

With respect to paragraph VI of plaintiff's complaint, defendant admits that the assessed value of its personal property is Forty-Six Thousand Dollars (\$46,000.00); however, defendant denies that it owes any money whatsoever to the City of Anchorage.

III.

With respect to paragraph VII of plaintiff's complaint, defendant admits that the allegations contained therein would be true if defendant, in fact, owed the City of Anchorage any money; however, defendant denies that it owes the City of Anchorage any money whatsoever.

IV.

Defendant denies the allegations set forth in paragraph VIII of plaintiff's complaint.

V.

Defendant admits the allegations set forth in paragraph IX of plaintiff's complaint.

VI.

With respect to paragraph X of plaintiff's complaint, defendant admits that it has failed to pay plaintiff; however, defendant denies that it has agreed to pay plaintiff.

Wherefore, defendant prays that plaintiff take nothing by virtue of its complaint filed herein and that defendant be awarded judgment against plaintiff for its costs and disbursements herein, including a reasonable attorney's fee and for such other relief as the court may deem just in the premises.

/s/ JOHN C. DUNN.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

STIPULATION

Comes now the plaintiff, through its attorney, L. Eugene Williams, and the defendant, through its attorney, John C. Dunn, and stipulate and agree as follows:

I.

That, attached hereto and marked Exhibit A, is a true copy of the letter written by defendant and delivered to plaintiff and that said letter is the first written evidence of the negotiations leading up to the written contract which is in dispute herein.

II.

That, attached hereto and marked Exhibit B, is a true copy of the minutes of the meeting of the City Council of plaintiff at which the execution of said contract was authorized and that said minutes accurately reflect what took place at said meeting of the City Council.

III.

That the contract attached to the complaint herein filed as Exhibit A is a true copy of the contract executed by plaintiff and defendant.

IV.

That the sewer line which is the subject of said contract has been installed and is in use.

V.

That, prior to the execution of said contract, it was mutually agreed between plaintiff and defendant that the Lot 12 mentioned in said letter and minutes of April 26, 1955, be excluded from said contract and that Lot 12 is in no way concerned with the matters in dispute herein.

VI.

That, except for the amount of money claimed by plaintiff to be owed plaintiff from defendant, the sole question to be decided herein is whether or not the word "property" as used in said contract means real property or whether it means real and personal property.

VII.

That the question of the meaning of the word "property" may be decided from the facts as stipulated herein and an examination of Exhibits A and B attached hereto, and of said contract; save and except that, in the event this Court rules that evidence is admissible as to the intent of the parties as to the meaning of "property" at the time of execution of said contract, plaintiff may call George Shannon, the City Manager, and B. W. Boeke, the City Clerk, to prove such intent of plaintiff, and defendant may call George Jackson, president of defendant, to prove the intent of defendant.

VIII.

That, should this Court decide that "property" means real property alone, judgment may be rendered in favor of defendant as prayed.

IX.

That, should this Court decide that "property" means real and personal property, there will, nevertheless, remain a question as to the amount of money which plaintiff is entitled to recover and that this amount, if any, will be determined at a later date, either by stipulation of the parties hereto or upon subsequent proof to be furnished this Court.

Dated at Anchorage, Alaska, December 10, 1956.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff.

/s/ JOHN C. DUNN,
Attorney for Defendant.

EXHIBIT A

Page 3

April 26, 1955.

Mr. George Shannon,
City Manager,
City of Anchorage,
Anchorage, Alaska.

Dear Mr. Shannon:

We request permission to install a sewer connection from our dairy, 931 East Sixth Avenue, to the existing sewer line on Sixth Avenue between Gambell and Fairbanks.

We understand the conditions and agree to the following:

1. We will pay in lieu of taxes a sum equal each year, we are connected to the City of Anchorage sewer, to taxes on our property which consist of Lots 10, 11, and 12 in Block 14A of the East Addition.

2. We will install and maintain the above sewer line at our expense.

3. We will complete the Sixth Avenue portion of the sewer line within the city limits, before, and in time, to not hinder the paving of this street.

4. We agree that the installation of this sewer line will not exempt us from any present or future sewer assessment or improvement district of the City of Anchorage or others.

Plans for the construction of this sewer line have been submitted, by us, to the City Engineer.

Yours very truly,

ALASKA DAIRY PRODUCTS
CORP.,

GEORGE D. JACKSON.

GDJ :jn

EXHIBIT B

Page 4

Minutes of the Regular Meeting of the City Council
Held on April 26, 1955, at 8:00 P.M.

The meeting was called to order by Mayor Taylor and the following councilmen reported present: Peterson, White, Engebret, A. Anderson, Davis.

Absent: J. Anderson. City officials present: Manager, Attorney, Chief of Police, Building Inspector, Telephone Superintendent, Comptroller, Planning Director, Clerk.

* * *

“The City Manager read a letter from Mr. George Jackson representing the Alaska Dairy Products Corporation, 931 East Sixth Avenue, requesting permission to install a sewer connection from the dairy, 931 East Sixth Avenue, to the existing sewer line on Sixth Avenue between Gambell and Fairbanks Streets, and agreeing to the following: 1. To pay in lieu of taxes a sum equal to taxes on their property, consisting of Lots 10, 11 and 12, Block 14A, East Addition, for each year they are connected to the City sewer. 2. To install and maintain the above sewer line at their own expense. 3. To complete the Sixth Avenue portion of the sewer line within the City limits before, and in time, not to hinder the paving of this street. 4. That the installation of this sewer line will not exempt them from any present or future sewer assessment or improvement district of the City of Anchorage or others.

“It was moved by White and seconded by A. Anderson that the request of the Alaska Dairy Products Corporation, to install a sewer connection from their plant at 931 East Sixth Avenue to the existing sewer line on Sixth Avenue between Gambell and Fairbanks Streets, be approved under the conditions, Items 1, 2, 3, and 4 outlined above, as per their letter of April 26, 1955. All voted in the affirmative.”

* * *

Certificate.

I, B. W. Boeke, City Clerk—Treas. of the City of Anchorage, Alaska, keeper and custodian of the records of said city, do hereby certify that the following is a true, full and correct excerpt of the Minutes of the City Council held on April 26, 1955.

Witness my hand and the seal of the City of Anchorage, Alaska, this 27th day of August, 1956.

.....,
B. W. BOEKE,
City Clerk-Treas.

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

JUDGMENT

This Matter came before the Court December 10, 1956, at which time plaintiff appeared through its Assistant City Attorney, L. Eugene Williams, and through its City Manager and City Clerk, and defendant appeared through its attorney, John C. Dunn, and its President; and counsel for the respective parties hereto having filed herein a stipulation with respect to various relevant facts; and each

party hereto having produced witnesses and adduced testimony in support of their respective contentions; and the Court being fully informed.

Now, Therefore, it is hereby ordered, adjudged and decreed that plaintiff take nothing by virtue of its complaint filed herein; that judgment is hereby entered in favor of defendant; and that defendant recover from plaintiff a reasonable attorney's fee of Sixty-Nine and no/100 Dollars (\$69.00).

Done in Open Court at Anchorage, Alaska, this 2nd day of Jan., 1957.

[Seal] /s/ WARREN C. COLVER,
Ex-Officio Justice of the Peace.

Copy received and approved for entry January 2, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff.

1/2/57—Oral notice of appeal given this date—
(W.C.C.) in open Court.

[Endorsed]: Filed Jan. 2, 1957.

In the District Court for the District of Alaska
Third Division

No. A-13,001

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORP.,

Defendant.

MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT

Plaintiff moves the court for leave to file an amended complaint, a copy of which is attached hereto.

Plaintiff on or about the 11th day of October, 1956, filed a complaint in the Justice Court against Alaska Dairy Products Corp. Judgment was obtained by the defendant and said cause was appealed to this court. The Justice Court is a court of limited jurisdiction and the remedy of declaratory judgment which is available under the Federal Rules is not available in that court and the allowance of an amended complaint will eliminate the need to file a separate action.

The Justice Court is a court of limited jurisdiction and the equitable remedy of reformation was not available, and the facts as presented in the

amended complaint may entitle plaintiff to a reformation.

Legislation passed by the 1957 Legislature raised a further question which was not litigated in the court below.

Subsequent to the filing of this complaint and the decision therein in the Justice Court, plaintiff has had trouble with certain other of its contracts, similar in nature to this one, and the duly elected council of the City of Anchorage is desirous of putting to rest the problems concerned with the services rendered under this and other similar contracts.

Wherefore, plaintiff respectfully prays that leave may be granted to file an amended complaint in this cause alleging the matters of fact as they appear in the amended complaint hereto attached.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Points and authority: Rule 15A, Federal Rules of Civil Procedure.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Comes Now the City of Anchorage, plaintiff herein, and for first claim for relief against the defendant alleges as follows:

I.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situate in the Third Judicial Division thereof.

II.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

III.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein as if fully set forth, wherein defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and, in consideration thereof, the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

IV.

Plaintiff alleges that according to this contract, said payment in lieu of taxes to be paid to the City, was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

V.

Plaintiff is now and was at all times material to this action performing under the terms of the contract and is furnishing sewer facilities to the defendant.

VI.

Plaintiff alleges that the defendant has paid to the City, Six Hundred Fifty and 25/100 (\$650.25) which is a payment in lieu of real property taxes.

VII.

Plaintiff alleges that defendant's personal property has an assessed value of Forty-six Thousand Dollars (\$46,000) on which amount the personal property taxes due the City would be in the amount of Four Hundred Sixty Dollars (\$460.00).

VIII.

That under the terms of said contract, defendant is indebted to plaintiff in the amount of Four Hundred Sixty Dollars (\$460.00).

IX.

That plaintiff has made demand on the defendant that the above amount be paid.

X.

Defendant has failed to pay the above amount as agreed to in the attached contract.

Comes Now the plaintiff herein and for second claim for relief in the alternative alleges:

I.

Plaintiff realleges paragraphs I, II, III, IV, and V of the first claim for relief.

II.

Prior to the execution of said agreement, defendant had agreed and understood that the payment by the defendant to the plaintiff for services to be rendered would be equal to the total City levy including real and personal property taxes which would be paid by the defendant were he located within the City limits of Anchorage.

III.

That by mutual mistake of the plaintiff and the defendant the said written agreement did not embody the actual agreement if the wording in Paragraph 3 of the contract means other than was stated in the paragraph preceding this.

IV.

The plaintiff through its duly authorized agent, the City Manager, acting under the direction of the City Council executed the agreement which did not embody the actual agreement as hereinabove alleged.

V.

Plaintiff's City Manager followed the direction and intent of the Council in so attempting to contract.

Comes Now the plaintiff herein and for third claim for relief in the alternative alleges:

I.

Plaintiff herein files this amended Complaint for Declaratory Judgment under Federal Declaratory

Judgment Act, 28 USCA, Section 2201, against the defendant, Alaska Dairy Products Corporation, and avers as follows:

II.

Plaintiff realleges Paragraphs I, II, III, IV, and V of first claim for relief.

III.

An actual controversy of a justiciable nature exists between plaintiff and defendant, involving their rights and liabilities under a contract entered into between them, and dependent upon the construction of their contract, which controversy may be determined by a judgment in this action, without other suits.

IV.

That this contract was entered into by the City Manager with authority from the duly elected and qualified council during the year 1955.

V.

Plaintiff alleges that the furnishing of sewer services by the City of Anchorage is performing a governmental function.

VI.

Plaintiff alleges that it has other contracts of similar nature and the determination of rights and liabilities of this contract will settle questions arising under these other contracts and avoid the necessity of multiple litigation.

VII.

Plaintiff, City of Anchorage, through its present duly elected counsel, has expressed a desire to terminate these contracts as being burdensome and causing financial loss which is not to the best interests of the City of Anchorage and therefore not in the best interests of the citizens of the City.

VIII.

Plaintiff, City of Anchorage, can only act within the limits of authority delegated it by the Territory of Alaska.

IX.

Plaintiff alleges that the furnishing of sewage facilities to persons outside the city limits of Anchorage may have been outside the scope of the authority delegated to the City and contracts made thereunder may be void or voidable.

Wherefore, plaintiff prays that it may have judgment against the defendant as follows:

1. That judgment be entered against the defendant in the amount of Four Hundred and Sixty Dollars (\$460.00) plus court costs and attorney's fees, or

2. That by decree of this court, the hereinabove-mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties, and

3. That the Court declare the rights and duties of said contract of May 18, 1955, and the controversy

stated in this complaint and determine the following:

a. Whether or not the City of Anchorage had authority to enter into such agreement.

b. If the City had no authority to enter into such agreement, determine that this agreement is void or voidable.

c. Declare that the present City Council is not bound by a contract to perform governmental functions made by a previous Council and therefore may terminate this agreement without liability.

.....,
L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

MINUTE ORDER OF JUNE 14, 1957, DENYING
MOTION TO FILE AMENDED COM-
PLAINT

Now at this time, upon the Court's motion:

It Is Ordered that the motion to file amended complaint in the above cause be and hereby is denied.

In the District Court for the District
of Alaska, Third Division

No. A-13,503

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORPORA-
TION,

Defendant.

COMPLAINT FOR DECLARATORY
JUDGMENT AND OTHER RELIEF

Comes Now the City of Anchorage, plaintiff
herein, and for first claim for relief against the
defendant alleges as follows:

I.

Plaintiff herein files this amended Complaint for
Declaratory Judgment under Federal Declaratory
Judgment Act, 28 USCA, Section 2201, against the
defendant, Alaska Dairy Products Corporation, and
avers as follows:

II.

An actual controversy of a justiciable nature ex-
ists between plaintiff and defendant, involving their
rights and liabilities under a contract entered into
between them, and dependent upon the construction
of their contract and dependent upon the validity

of their contract, which may be determined by a judgment in this action, without other suits.

III.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situate in the Third Judicial Division thereof.

IV.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

V.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein as if fully set forth, wherein defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and, in consideration thereof, the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

VI.

Plaintiff is now and was at all times material to this action performing under the terms of the contract and is furnishing sewer facilities to the defendant.

VII.

That this contract was entered into by the City Manager with authority from the duly elected and qualified Council during the year 1955.

VIII.

Plaintiff alleges that the furnishing of sewer services by the City of Anchorage is performing a governmental function.

IX.

Plaintiff alleges that it has other contracts of similar nature and the determination of rights and liabilities of this contract will settle questions arising under these other contracts and avoid the necessity of multiple litigation.

X.

Plaintiff, City of Anchorage, through its present duly elected Council has expressed a desire to terminate this contract as being burdensome and causing financial loss which is not to the best interests of the citizens of the City, but cannot do so without a determination by the Court of its right to do so without subjecting the City to possible liability.

XI.

Plaintiff, City of Anchorage can only act within the limits of authority delegated it by the Territory of Alaska; such powers are found generally in 16-1-35 ACLA 1949.

XII.

Plaintiff alleges that the furnishing of sewage facilities to persons outside the city limits of Anchorage was outside the scope of the authority delegated to the City and contracts made thereunder were void.

Comes Now the plaintiff herein and for second claim for relief alleges:

I.

Plaintiff realleges Paragraphs III, IV, V, and VI of the first claim for relief.

II.

Plaintiff alleges that, according to this contract, said payment in lieu of taxes to be paid to the City, was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

III.

Prior to the execution of said agreement, defendant had agreed and understood that the payment by the defendant to the plaintiff for services to be rendered would be equal to the total City levy including real and personal property taxes which would be paid by the defendant were he located within the City limits of Anchorage.

IV.

That by mutual mistake of the plaintiff and the defendant the said written agreement did not embody the actual agreement if the wording in Paragraph 3 of the contract means other than was stated in the paragraph preceding this.

V.

The plaintiff through its duly authorized agent, the City Manager, acting under the direction of the

City Council, executed the agreement which did not embody the actual agreement as hereinabove alleged.

VI.

Plaintiff's City Manager followed the direction and intent of the Council in so attempting to contract.

Wherefore, plaintiff prays that it may have judgment against the defendant as follows:

1. That by decree of this court, the hereinabove-mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties, and

2. That the Court declare the rights and duties under contract of May 18, 1955, and the controversy stated in this complaint and determine the following:

- a. Whether or not the City of Anchorage had authority to enter into such agreement.

- b. That the City had no authority to enter into such agreement, and, therefore, determine that this agreement is void.

- c. Declare that the present City Council is not bound by a contract to perform governmental functions made by a previous Council and, therefore, may terminate this agreement without liability.

3. For Court costs incurred, reasonable attorney's fees, and for such other and further relief as

to the Court seems just and equitable in the premises.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

[Agreement—see pages 6 to 8 of this printed record.]

[Endorsed]: Filed June 17, 1957.

[Title of District Court and Cause.]

No. 13-503

MOTION TO DISMISS

Comes Now the Defendant, through its attorneys, Manders, Butcher, Dunn & Connolly, and moves the Court to dismiss the above-entitled action for the following reasons:

(a) The Complaint filed herein fails to state a claim upon which relief can be granted plaintiff against defendant;

(b) All matters raised by the Complaint filed herein have already been decided by this Court;

(c) Plaintiff is barred from raising the matters complained of herein by virtue of res adjudicata and improper joinder;

(d) The Complaint filed herein is nothing more

than an attempt to avoid the effect of a previous order of this Court.

/s/ JOHN C. DUNN,
Attorney for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed July 29, 1957.

[Title of District Court and Cause.]

No. 13-503

MEMORANDUM SUPPORTING
DEFENDANT'S MOTION TO DISMISS

* * *

Plaintiff has waived whatever rights it may have initially had to seek the relief requested in 13-503 by virtue of having filed the original action numbered 10-297C before the U. S. Commissioner for the Anchorage Precinct and then appealing the same to this Court as 13-001.

* * *

Respectfully submitted.

/s/ JOHN C. DUNN, of
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1957.

[Title of District Court and Cause.]

No. A-13,503

MINUTE ORDER OF SEPT. 5, 1957,
RENDERING ORAL DECISION

Before: The Honorable J. L. McCarrey, Jr.,
District Judge.

Now at this time, arguments having heretofore and on the 12th day of August, 1957, been had in the above cause, and the Court having reserved its decision,

Whereupon, Court now renders its oral decision, and now grants motion to dismiss, with prejudice for the reason a declaratory judgment act is procedural and does not create new rights upon a cause of action previously decided. Issues decided in initial action filed by a party are conclusively determined as between the parties under the doctrine of res judicata, and the Court directs counsel for movant to prepare and submit written order accordingly.

[Title of District Court and Cause.]

No. 13-503

MOTION AND JUDGMENT OF DISMISSAL
WITH PREJUDICE

This matter came before the Court on August 12, 1957, on the motion of Defendant, through its at-

torneys Manders, Butcher, Dunn & Connolly; at which time Defendant appeared through his said attorneys and Plaintiff through its Assistant City Attorney Mr. L. Eugene Williams, Esq.; and, at which time the Court heard argument and examined authorities advanced and presented by counsel for all parties hereto, and being fully informed,

Now, therefore, it is hereby Ordered, Adjudged and Decreed that the above-entitled action be, and the same hereby is, dismissed with prejudice; and

It is further ordered, adjudged and decreed that Defendant is granted judgment against Plaintiff herein for his costs in defending this action which consists of an attorney's fee which is hereby assessed in the amount of \$75.00.

Done in Open Court at Anchorage, Alaska, this 12th day of September, 1957.

/s/ J. L. McCARREY, JR.,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered Sept. 12, 1957.

[Title of District Court and Cause.]

No. 13,503

OBJECTIONS TO PROPOSED JUDGMENT

Plaintiff objects to Paragraph 2 of the proposed judgment of dismissal for the reason that it fails to

set out the reasoning and language contained in the minute order.

Dated at Anchorage, Alaska, this 16th day of September, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

9-17-57.

Objection is overruled since the reason for the court's ruling was given in its oral opinion and a judgment is not a proper document to incorporate findings and conclusions.

/s/ J. L. McC.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1957.

[Title of District Court and Cause.]

No. A-13,503

NOTICE OF APPEAL

To: The Clerk of the District Court, Third Division,
District of Alaska:

Sir:

Notice is hereby given that the City of Anchorage, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the District Court for

the Third Division, District of Alaska, dismissing with prejudice as prayed for by Alaska Dairy Products Corporation, the action of the City of Anchorage, which action was dismissed on the 12th day of September, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff City of
Anchorage.

[Title of District Court and Cause.]

No. A-13,503

STATEMENT OF POINTS RELIED ON

1. The court erred in not allowing plaintiff to amend its complaint after appeal from Justice Court in Cause No. 13,001.
2. The Justice Court is a court of limited jurisdiction and its jurisdiction is statutory.
3. Additional relief sought by plaintiff in District Court after appeal from Justice Court where trial is de novo was not available in the court below.
4. The Court erred in granting defendant's Motion to Dismiss.
5. The Court erred in ruling plaintiff's claim for relief was previously determined by Justice Court.

6. The Justice Court has no equitable jurisdiction.

7. The Justice Court had no jurisdiction to try an action for declaratory judgment.

8. The pleadings in Justice Court did not plead a claim for relief in the nature of reformation.

9. The pleadings and original action in Justice Court pleaded no claim for relief under the Declaration Judgment Act.

10. The judgment for defendant is contrary to law.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 3, 1957.

[Title of District Court and Cause.]

No. A-13,503

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure and the designation of counsel for the plaintiff-appellant and coun-

sel for the defendant-appellee, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment of Dismissal filed and entered in the above-entitled cause by the above-entitled court on September 12, 1957.

Dated at Anchorage, Alaska, this 5th day of November, 1957.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15788. United States Court of Appeals for the Ninth Circuit. City of Anchorage, a Corporation, Appellant, vs. Alaska Dairy Products Corporation, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed November 7, 1957.

Docketed November 15, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

The Appellant herein makes the following statement of points:

1. The court erred in not allowing appellant to amend its complaint after appeal from Justice Court in Cause No. A-13,001.

2. The Justice Court is a court of limited jurisdiction and its jurisdiction is statutory.

3. Additional relief sought by appellant in District Court after appeal from Justice Court where trial is de novo was not available in the court below.

4. The court erred in granting appellee's Motion to Dismiss.

5. The court erred in ruling appellant's claim for relief was previously determined by Justice Court.

6. The Justice Court has no equitable jurisdiction.

7. The Justice Court had no jurisdiction to try an action for declaratory judgment.

8. The pleadings in Justice Court did not plead a claim for relief in the nature of reformation.

9. The pleadings and original action in Justice Court pleaded no claim for relief under the Declaration Judgment Act.

10. The judgment for defendant is contrary to law.

/s/ JAMES M. FITZGERALD,

/s/ L. EUGENE WILLIAMS,

Attorneys for Appellant, City
of Anchorage.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 15, 1957.

In the United States Court of Appeals
for the Ninth Circuit

No. 15788

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORA-
TION,

Appellee.

DESIGNATION OF RECORD

Appellant, City of Anchorage, by its attorneys, hereby designates under Rule 17 (6) of the United States Court of Appeals, Ninth Circuit, and Rule 75 of the Federal Rules of Civil Procedure, the fol-

lowing to constitute the transcript of record on appeal in the above-entitled case:

Name of Instrument and Date Filed or Entered

1. Complaint in Cause No. A-13,001 as originally filed in Justice Court in Cause No. 10,297C and exhibit attached to Complaint, October 11, 1956.

2. Answer to Cause No. A-13,001 as originally filed in Justice Court in Cause No. 10,297C, December 10, 1956.

3. Judgment entered in Justice Court appearing in transcript of appeal in Cause No. A-13,001 with notation of oral Notice of Appeal, January 2, 1957.

4. Motion for Leave to File Amended Complaint and Amended Complaint Accompanying Motion, June 6, 1957.

5. Minute Order denying leave to file Amended Complaint, June 14, 1957.

6. Complaint in Cause No. A-13,503, June 17, 1957.

7. Defendant's Motion to Dismiss, June 29, 1957.

8. Minute Order rendering oral decision on Motion to Dismiss, September 5, 1957.

9. Defendant's Motion and Judgment of Dismissal With Prejudice, September 12, 1957.

10. Notice of Appeal, October 7, 1957.

11. Plaintiff's (appellant) Statement of Points,
October 25, 1957.

/s/ JAMES M. FITZGERALD,

/s/ L. EUGENE WILLIAMS,

Attorneys for Appellant, City
of Anchorage.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 15, 1957.

[Title of Court of Appeals and Cause.]

**MOTION OF OBJECTION TO APPELLANT'S
DESIGNATION OF RECORD ON APPEAL**

Comes Now the Appellee, through its attorney, John C. Dunn, and moves the court to delete from the record on appeal herein items 4 and 5 of the Designation of Record on Appeal heretofore filed by Appellant in the above-entitled court and cause.

This motion is made under Rule 15 of the above-entitled court and is supported by a Memorandum filed concurrently herewith.

/s/ JOHN C. DUNN,

Attorney for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed November 18, 1957.

[Title of Court of Appeals and Cause.]

MEMORANDUM SUPPORTING APPELLEE'S
MOTION OF OBJECTION TO APPELLANT'S DESIGNATION OF RECORD ON
APPEAL

Items 4 and 5 of Appellant's Designation of Record on Appeal are a motion for leave to file an amended complaint, the proposed complaint as amended, and a minute order denying leave to file an amended complaint. These items were filed in Civil Action 13,001 in the District Court for the Territory of Alaska, Third Division, Anchorage, Alaska.

This appeal and the sole matter before this court is taken in Civil Action numbered 13,503 by the District Court for the Territory of Alaska, Third Division, Anchorage, Alaska, a different and separate action from the one in which the order denying leave to file an amended complaint was entered.

This court has repeatedly held that only final orders are appealable. An order denying leave to file an amended complaint is not a final order, and, hence, not a proper subject of appeal. Should the refusal to permit the filing of an amended complaint constitute error, such would be a point to be raised on appeal, but only after the final determination of the case in which amendment of the complaint was sought; namely, in Civil Action 13,001, and not the action in which this appeal is taken.

The sole question before this court is whether or not the lower court erred in entering in judgment of dismissal in Civil Action 13,503.

No appeal has been taken in 13,001, from the order denying leave to file an amended complaint or otherwise; and the time of appeal has elapsed even if such an order were final and the proper subject of appeal. The minute order denying leave to file an amended complaint in 13,001 was entered June 14, 1957.

For these reasons, Appellee submits that said items 4 and 5 should be deleted from the record on this appeal.

/s/ JOHN C. DUNN,
Attorney for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed November 18, 1957.

No. 15,788

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLANT.

JAMES M. FITZGERALD,

City Attorney of the City of Anchorage,

L. EUGENE WILLIAMS,

Assistant City Attorney of the City of Anchorage,

Box 400, Anchorage, Alaska,

Attorneys for Appellant.

FILED

MAR 10 1958

PAUL P. O'BRIEN, CLERK

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No. 15,788

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal taken from a final judgment in favor of Appellee and entered in the District Court for the Territory of Alaska, Third Judicial Division on the 12th day of September, 1957.

The District Court had jurisdiction by virtue of the Act of June 6, 1900, c. 786, Section 431, Stat. 322, as amended, 48 USCA Sec. 101. The United States Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 1291 of Title 28 of the United States Code (as amended, October 31, 1951, c. 655, Sec. 48, 65 Stat. 726).

STATEMENT OF THE CASE.

The Appellant filed an action in the Justice Court for the Anchorage Precinct, Third Division, Territory of Alaska. The complaint alleged in substance, a contract between the Alaska Dairy Products and the City of Anchorage wherein the Alaska Dairy Products agreed to make a payment in lieu of taxes to the City of Anchorage in return for the City's furnishing certain sewer service. The payment to be made by Alaska Dairy Products, according to the City of Anchorage, was to be equal to the total tax on the Dairy's real and personal property. Alaska Dairy Products filed an answer admitting certain allegations but denying that it owed the City of Anchorage any amount of money, and denying it agreed to pay any amount covering personal property. A copy of the contract was attached to the complaint. Thereafter, a stipulation was entered into by the parties, that the sewer line was installed by the City and was in use, and further stipulated for purposes of the suit in the Justice Court that the sole question to be determined was whether or not property, as used in the contract meant real property, or real property and personal property.

Thereafter on January 2, 1957, a judgment was entered in favor of the Alaska Dairy Products. Oral notice of appeal was given by the City of Anchorage and the cause was now before the District Court for the Third Division.

Appellant moved for leave to file an amended complaint, attaching a copy of said complaint to its mo-

tion. Appellant alleged the same facts in its first claim for relief. Appellant then sought, by way of an amendment, the remedy of reformation in its second claim for relief. Appellant, as a third claim for relief, sought relief under the Declaratory Judgment Act (28 USCA, Sec. 2201) asking the District Court precisely whether or not the City was still bound by such a contract wherein they were performing a governmental function and also whether or not entering into this type of contract for services outside the City was within the scope of its authority under Territorial law.

Appellee, Alaska Dairy Products, filed a memorandum in opposition to Appellant's motion for leave to file an amended complaint. This motion was argued before the court and the court on the 14th day of June, 1957, by minute order, denied Appellant's leave to file an amended complaint.

Thereafter, the Appellant City filed a new complaint which became Cause No. A-13,503 seeking a declaratory judgment and certain other relief. The relief sought in this complaint is essentially the same as the second and third claims for relief in the proposed amended complaint in Cause No. A-13,001, seeking a declaratory judgment and reformation. Appellee, Alaska Dairy Products, thereafter filed a motion to dismiss, supported by a memorandum. The motion was heard by oral argument, and on the basis of the oral argument and the memorandums filed by both sides, the Court, by minute order on September 5, 1957, dismissed Appellant's complaint on the

grounds that it had previously been decided in the cause before the Justice Court, and ordered counsel to prepare written order accordingly. Appellee submitted a judgment dismissing Appellant's complaint ordering, adjudging and decreeing the action be dismissed with prejudice. Thereafter, the Appellant appealed to this Court by giving notice of appeal, filed in the District Court on the 7th day of October, 1957.

SPECIFICATION OF ERROR.

1. The Court erred in not allowing Appellant to amend its complaint after appeal from Justice Court in Cause No. A-13,001.

2. The Court erred in denying the additional relief sought by Appellant in District Court where trial is *de novo* and relief was not available in the Justice Court.

3. The Court erred in granting Appellee's motion to dismiss.

4. The Court erred in ruling Appellant's claim for relief was previously determined by Justice Court.

5. The pleadings in the original action in Justice Court pleaded no claim for relief under the Declaratory Judgment Act, nor sought reformation.

6. The Justice Court is a court of limited jurisdiction and had no jurisdiction to try causes seeking equitable relief.

7. The issues raised by the pleadings in this case were not determined by the judgment in the Justice Court.

8. The pleading in this case pleaded new causes of action not previously determined.

ARGUMENT AND AUTHORITIES.

ARGUMENT I.

THE COURT ERRED IN NOT ALLOWING PLAINTIFF TO AMEND THE COMPLAINT AFTER AN APPEAL WAS PERFECTED FROM THE JUSTICE COURT.

Rule 15(a) of the Federal Rules of Civil Procedure requires leave of court to amend a complaint after responsive pleading has been served. The motion for leave to file an amended complaint was urged in the District Court (TR p. 19).

The reasons for such amendment were stated in the motion, the chief reason being to allow the Appellant to try in one action already begun, all the matters in dispute with the Appellee. The general test, and it would seem the best test for allowing or disallowing amendments of pleadings, is whether or not justice would be promoted by the proposed amendment (*Securities and Exchange Commission v. Universal Services Association*, 106 F. 2d 232, cert. denied, 308 U.S. 622, 84 L.Ed. 519, 60 S.Ct. 378). Also important in deciding such a motion is whether or not any injustice is worked on the opposing party by allowing the amendment (*Fierstein v. Piper Aircraft*, 79 F. Supp. 217). No claim of prejudice was made or could the Appellee urge that any injustice be worked by allowing such an amendment. As is pointed out in Appellee's memorandum supporting the motion of objec-

tion to Appellant's designation of record on appeal (TR p. 44). Allowance or disallowance of an amendment is discretionary and not a final or appealable order. Appellant however, urges this point to properly put before this Court the background of the case. The complaint and necessarily the judgment in the first case, which became Cause No. 13,001 after appeal from the Justice Court (TR p. 3) is before this Court because it must necessarily be a portion of the record as the District Court ruled that the issues decided by the judgment in that cause precluded relitigating the issues raised in the complaint filed in Cause No. 13,503 (TR p. 27) as they had already been decided in the Justice Court and therefore would be *res judicata*.

Amendments to complaints after an appeal from the Justice Court are also governed in Alaska by Section 68-9-14, ACLA 1949 which section is as follows:

AMENDMENTS: FORMAL PLEADINGS.

In all cases of appeal the bill of items of the account sued on, or filed as a counterclaim or set-off, or the abatement of the plaintiff's cause of action, or of the defendant's counterclaim or set-off, or other ground of defense filed before the justice, may be amended upon appeal in the appellate court to supply any defect, deficiency, or omission therein, by filing formal pleadings therein when by such amendment substantial justice will be promoted; and in all cases when required by the court, or by either party to the action, formal pleadings shall be filed on either side upon the trial of the cause on appeal; when

either party requires such formal pleadings he shall cause to be served on the opposite party a notice thereof in writing, and file the same in the court where the cause is pending by the first day of the term of such court at which such cause is to be tried; but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment.

This section was urged by the Appellee in opposing the motion for leave to file an amended complaint. Though no reasons were stated in the minute order (TR p. 26) denying leave to file an amended complaint, it might be assumed that the District Court decided the motion on the basis of the last portion of that section, which is, “. . . but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment.” If this was the portion of the statute that the District Court relied on in denying the motion for leave to file an amended complaint, the denial of the motion would have been proper. But then we are faced with the problem of how the Court could then rule that the claim for relief urged in the complaint in Cause No. 13,503 (TR p. 27) had been previously decided by the Justice Court as the court ruled in the minute order (TR p. 34). In other words, if the Court decided that the amended complaint urged new claims for relief and therefore by virtue of the above quoted section these new claims were not proper to be added by amendment, how then could the Court say that these claims or causes of action had already been decided.

ARGUMENT II.

THE JUSTICE COURT FOR THE TERRITORY OF ALASKA IS A COURT OF LIMITED JURISDICTION, ITS JURISDICTION IS GOVERNED BY STATUTE AND THE CLAIMS FOR RELIEF PLEADED IN CAUSE NO. 13,503 COULD NOT HAVE BEEN BROUGHT IN THE JUSTICE COURT.

The jurisdiction of the Justice Court is stated in Section 68-2-1, ACLA 1949 as follows:

ACTIONS WITHIN JURISDICTION: JUDGMENT ON CONFESSION.

A justice's court has jurisdiction, but not exclusive, of the following actions:

First. For the recovery of money or damages only when the amount claimed does not exceed one thousand dollars;

Second. For the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed one thousand dollars;

Third. For the recovery of any penalty or forfeiture, whether given by statute or arising out of contract, not exceeding one thousand dollars;

Fourth. Also to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute.

The next Section, 68-2-2 provides:

ACTIONS NOT WITHIN JURISDICTION.

The jurisdiction conferred by the last section does not extend, however—

First. To an action in which the title to real property shall come in question;

Second. To an action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction upon a promise to marry, in actions of an equitable nature, or in admiralty causes.

It is thus provided that equitable actions are specifically excluded from the jurisdiction of the Justice Court.

In Appellant's second claim for relief (TR p. 30) Appellant asks for reformation of the agreement, thus we see that not only was the equitable cause of reformation not pleaded in the cause filed in the Justice Court, but that had it been pleaded it could not have been heard nor passed on as not being within the jurisdiction of that Court. In Appellant's first claim for relief (TR p. 27) appellant seeks relief under the Declaratory Judgment Act. It is urged that the Justice Court also had no jurisdiction to try an action for declaratory judgment. In the District Court's minute order dismissing the complaint in Cause No. 13,503 the Court said, (TR p. 34) that the declaratory judgment act is procedural and does not create new rights upon a cause of action previously decided. Assuming for purposes of argument that this portion is correct, it is urged that the second claim for relief filed in Cause No. 13,503 in the complaint, raises the issue of whether or not the Appellant is entitled to reformation. It is urged that at least this claim for relief was not and could not have been decided in the Justice Court which lacked jurisdiction, and therefore the doctrine of *res judicata* is not applicable to this claim for relief.

ARGUMENT III.

THE COURT ERRED IN RULING THAT THE ISSUES DECIDED IN THE INITIAL ACTION FILED WERE CONCLUSIVELY DETERMINED AS BETWEEN THE PARTIES UNDER THE DOCTRINE OF RES JUDICATA.

The Court granted Appellant's motion to dismiss complaint in Cause No. 13,503 and ruled that the "Issues decided in initial action filed by a party are conclusively determined as between the parties under the doctrine of *res judicata* . . ." (TR p. 34). The ruling of the Court is unintelligible at best. The Court confuses the doctrine of collateral estoppel and *res judicata*. It remains however that the judgment of dismissal was signed and entered. As there are no findings or conclusions, the minute order must stand as the basis of the Court's ruling. It must be assumed then that the District Court ruled that the judgment in the Justice Court (TR p. 17) precluded the Appellant, City of Anchorage from litigating the claims for relief in the complaint filed in Cause No. 13,503 (TR p. 27). In this the Court was in error. To determine what issues were conclusively determined, or what cause of action was decided by the Court in the first instance which was the Justice Court, one must look at the pleadings. In the instant case the pleadings, as originally filed, are further limited and narrowed by a stipulation entered into by the parties (TR p. 12). It is worthy to note that in paragraph 6 of that stipulation (TR p. 13) we find the following language: ". . . the sole question to be decided herein is whether or not the word 'property' as used in said contract means real property or

whether it means real and personal property.” The judgment then rendered by the Justice in the Justice Court (TR p. 17) ruled that Appellant was not entitled to relief, and thus decided that the word property, contained in the agreement (TR p. 6) meant only real property and that therefore the Appellant was not entitled for the amount sued for which would have been due had the word property meant real and personal property.

It cannot be assumed that the Justice in entering this judgment would go beyond the stipulation in arriving at his decision. An appeal was taken from this judgment as indicated (TR p. 18). After this appeal was taken, the cause was then before the District Court. A trial in the District Court on an appeal from the Justice Court is a trial *de novo* (ACLA 1949, 68-9-10). Whether or not the stipulation would limit the District Court in determining the cause as appealed remains in question. However, at this point with or without the stipulation, it remains that the Justice Court only passed on the issues as framed by the pleadings and these pleadings were further limited by the stipulation. Although the defense of *res judicata* is not one specifically provided for by the Federal Rules as one of the defenses that can be raised on a motion to dismiss, here both proceedings being before the same Court and Judge, the fact that this defense was not pleaded, but raised in a motion to dismiss may be acceptable procedure. However, the defense of *res judicata* should generally be pleaded (*Cruz-Sanchez v. Robinson*, 136 F. Supp. 52). The pleading and proving of the defense of *res judicata*

is the better practice. Assuming that the stipulation filed by the parties to the original action in the Justice Court did not limit the issues that would be considered finally adjudicated unless changed on appeal to the District Court, it must be determined what was passed on by the Justice Court and thus precluded from being raised by the parties in the subsequent proceedings.

Judge Holmes has stated the principals involved in *res judicata* in the case of *Hyman v. Regenstein*, 222 F. 2d 545, page 549, "In order to make a matter *res judicata*, there must be a concurrence of four conditions, namely: 1. Identity in the thing sued for; 2. Identity of the cause of action; 3. Identity of persons and of parties to the action; 4. Identity of the quality in the persons for or against whom the claim is made." The Court went on to say later, "These are affirmative defenses that must meet the test required by the doctrine of *res judicata*." (Ibid.) In the instant case, the Court ruled without benefit of pleading or evidence. In examining the present record, it can be seen that only items 3 and 4 have been met. The persons and parties to the action are the same, and the identity of the quality of the persons is the same. However, the identity of the thing sued for and the identity of the cause of action are not the same. The Appellant-Plaintiff below, in the Justice Court, asked in his prayer for relief for the amount of \$400.00 in a money judgment based on the contract between it and the Appellee. The basis of Appellant's claim was the contract entered into by it and the Appellee wherein the Appellee agreed to pay

certain monies to the Appellant in lieu of taxes for sewer services to be rendered by the City of Anchorage. It was the Appellant's contention that such payment in lieu of taxes be equal to the total City levy including both real and personal property of the Appellee Alaska Dairy Products. Appellee in its answer (TR p. 10) admitted paragraphs 1 through 5 of Appellant's complaint, admitted that the assessed valuation of its personal property was \$46,000.00 but denied that it ever agreed to pay the City of Anchorage any amount because of personal property. Stipulations were made and evidence was heard by the Justice. The judgment was entered (TR p. 17) ruling that the City, Appellant here, had no money coming from Alaska Dairy Products and that the agreement entered into by the parties contemplated only a payment in lieu of taxes on the real property of the Appellee. This case was then appealed. In examining the complaint in Cause No. 13,503 (TR p. 27) as to the thing sued for, or the prayer for relief in that complaint, (TR p. 31) here Appellant asks that the Court reform the instrument according to the intent of the parties, further, that the Court declare certain rights and duties under the contract entered into by the party, but no allegation is made that the Court declare that the word property, as used in the contract, mean real and personal property as the Justice Court in the first case already decided that as used in the contract it meant only personal property. It is thus urged that Test No. 1, layed down by Judge Holmes, "Identity to the things sued for" has not been met. As to Point No. 2, "Identity of the cause

of action'', it is maintained that the cause of action is not the same either. It is urged that the cause of action originally filed in the Justice Court was a cause of action for money due and owing on a contract and involves an interpretation of that contract. The judgment was against the Appellant and the interpretation was in favor of the Appellee. In the complaint, which is the subject of this appeal, Appellant is asking that the Court reform the instrument according to the intent of the parties. The facts alleged which would necessarily have to be proven to entitle the Appellant to reformation are not the same facts that were proved to obtain the judgment in the original cause filed in the Justice Court. Appellant in this latter complaint also asks for a declaratory judgment. It is true that this could involve a redetermination of the meaning of the words as used by the parties in the contract. However, in examining the allegations in the pleading, it is obvious that different allegations are made and different facts would need to be proven in order to establish the claims made in the prayer for relief. It is therefore urged that the identity of the cause of action is not the same and the defense as urged by the Appellee of *res judicata* has failed to meet the second test laid down by Judge Holmes.

The principals involved in the defense *res judicata* are general in nature. Each case must be examined as to its own fact situation. It is urged here that different causes of action or claims for relief are pleaded in the second complaint. Support for the conclusions that where different causes for action were pleaded even though the parties were the same,

the defense of *res judicata* will not be sustained, can be found in *Speed Products Co. v. Tinnerman Products*, 222 F.2d 61. Under the defense of *res judicata*, a second suit is barred on the *same* (emphasis supplied) cause of action (*Lawler v. National Screen Services Company*, 75 S.Ct. 865, 349 U.S. 322, 99 L.Ed. 1122).

Equally applicable in the instant case, as in the *Tinnerman* case, *Speed Products Co. v. Tinnerman Products*, 222 F. 2d 61, is that certain matters that were actually litigated cannot be again litigated because of the defense of collateral estoppel. If the stipulation (TR p. 12) has any bearing, the only major issue actually litigated in the Justice Court was the meaning of the word "property" as used by the parties in the agreement (TR p. 6). Under the similar theory of collateral estoppel the issues actually litigated in the first action cannot be relitigated in the second suit (*Lawler v. National Screen Services Company*, 75 S.Ct. 865, 349 U.S. 322, 99 L.Ed. 1122; *Fairmount Aluminum v. Commission of Internal Revenue*, 222 F. 2d 622, cert. denied 76 S.Ct. 76, 350 U.S. 838, 100 L.Ed. 748, rehearing denied 76 S.Ct. 177, 350 U.S. 905, 100 L.Ed. 795, rehearing denied 77 S.Ct. 144, 362 U.S. 913, 1 L.Ed. 2d 120; *Parker v. Westover*, 221 F. 2d 603; *Providential Development Co. v. U. S. Steel Co.*, 236 F. 2d 277).

Query. How, on the basis of the record before the District Court, could the Court determine exactly what issues were passed on by the Justice Court? If certain issues have been finally adjudicated, the record on appeal is not conclusive as to which exactly they

are. Yet the District Court has said in effect, the Appellant has stated no claim for relief and has dismissed Appellants action. The Court has dismissed an action presumably based on the doctrine of *res judicata*, but talks in the minute order in terms of collateral estoppel. There certainly isn't enough in the record to sustain dismissing Appellant's action.

CONCLUSION.

1. Appellant has stated valid claims for relief which have not previously been decided by a Court of competent jurisdiction.

2. The Court erred in dismissing Appellant's action based on a ruling that issues decided in initial action filed by a party are conclusively determined as between the parties.

It is therefore urged that the judgment dismissing Appellant's action be reversed and Appellant prays that Appellee be required to answer the complaint.

Dated, Anchorage, Alaska,
February 27, 1958.

Respectfully submitted,

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No. 15,788

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE,
a municipal corporation,

Appellant,

VS.

ALASKA DAIRY PRODUCTS CORPORATION,
Appellee.

REPLY BRIEF FOR APPELLANT.

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Appellant,

VS.

ALASKA DAIRY PRODUCTS CORPORATION,
Appellee.

REPLY BRIEF FOR APPELLANT.

INTRODUCTION.

Appellant and Appellee have already set forth statements of the case and no further statement is necessary, however one point in Appellee's statement should be considered for clarification. Appellee says in his statement of the case (Appellee's brief, page 3): "Counsel for Appellant and Appellee have stipulated that this Court may consider the fact that, in 10-297-C, George C. Shannon and B. W. Boeke testified that the intent of the parties was that 'property' meant real and personal property, and that George G. Jackson testified that the intent of the parties was that 'property' meant real property alone." It is stipulated

that this was the testimony elicited in the Justice Court, however, unless this Court makes it part of the record it should not be considered as part of the record, and Appellant has not stipulated that it may be considered. The stipulation as to the testimony in the Justice Court is not material to a determination of this appeal. Appellee has indicated ten primary questions which he considers necessary to a determination of this appeal. Appellant's argument will follow as closely as possible Appellee's brief except that Point 1 and Point 10 will be considered together at the beginning.

ARGUMENT.

APPELLEE'S ARGUMENTS 1 AND 10.

Appellee's first statement suggests agreement with our position that the Court erred, at least in its reasoning. Appellee says: "The reason stated by the District Court for entering the judgment appealed from is immaterial." (Appellee's brief, page 7.) Appellant submits, no further reason for dismissing Appellant's complaint can be found. Appellee does attempt to support the ruling of the District Court in its 10th Point, although it seems inconsistent with the first argument. Appellee states: "The law is established that the doctrine of *res judicata* operates as a bar not only as to what was litigated but as to what could have been litigated." (Appellee's brief, page 43.) Appellant has urged that the remedy of reformation and the issues involved in reformation

could not have been litigated in the Justice Court. (Appellant's brief, page 8.) Nor could a declaratory judgment be sought. Appellee fails to show specifically what issues have been or could have been litigated in the initial cause of action in the Justice Court. Appellee then takes the apparent erroneously applied principle of *res judicata* and asks this Court to extend that principle to whatever courts were available. (Appellee's brief, page 43.) Appellee cites no authority for this novel theory, apparently an original one. The final blow to the principle of *res judicata* as a valid reason that will sustain dismissal of Appellant's complaint is dealt by Appellee on page 44, where Appellee says: "If this Court sees fit, however, to limit the doctrine of *res judicata* to matters actually adjudicated, Appellee does not contend under this limited application of the doctrine, that the declaratory judgment relief will be barred, but Appellee does contend that, even under this limited application of the doctrine, the relief of reformation will be barred." Appellant argues if any claim for relief can stand then the Court erred in dismissing the complaint. The proper remedy would have been a motion to strike the improper portions.

APPELLEE'S ARGUMENT 2.

The second point, Appellee raises for consideration by this Court (Appellee's brief, page 8) seems to be a matter of policy Appellee hopes will be adopted. Appellant's mistake was to begin in the Justice Court.

When this case was appealed it attempted by way of amendment (Transcript page 19) to settle everything in one action which was denied when the Court denied Appellant's motion for leave to amend. (Transcript page 26.) As authority for Appellant's "policy" argument Rule 13, Federal Rules of Civil Procedure is quoted, which rule applies to counterclaims. Appellee assumes that declaratory judgment would be futile. (Appellee's brief, page 13.) For purposes of a motion to dismiss, the allegations in the complaint are considered as true, whether or not relief prayed for would be futile depends on the merits of the case and thus should not be considered by this Court.

APPELLEE'S ARGUMENT 4.

Appellee then queries "Is Appellant estopped from maintaining A-13,503?" (Appellee's brief, page 13.) Appellee is confused. First he indicates that Appellant thought that a judgment in the Justice Court would conclude the matter then urges that the Appellee had a right to rely on the fact that an appeal to the District Court would end litigation. Further confusion is added when Appellee misstates the fact by saying: "In opposing the amendment to the complaint in A-13001." (Appellee's brief, page 14.) Appellee opposed the motion to amend the complaint. Further references in this argument are to annoyance, expense and inconvenience, which language runs consistently through the Appellee's brief as an apparent attempt to appeal to the emotions.

APPELLEE'S ARGUMENT 5.

The next argument apparently deals with waiver. (Appellee's brief, page 15.) No authority is urged to back Appellee's argument of waiver as the basis of dismissing Appellant's complaint. It is difficult to see how plaintiff-appellant can waive a right it did not have, that right being a right to sue for reformation and to bring an action in the nature of declaratory judgment, said action not being within the jurisdiction of the Justice Court.

APPELLEE'S ARGUMENT 6.

Although Appellee queries "Are there multiple causes of action here or but a single cause of action in multiple remedies?" (Appellee's brief, page 16.) This question proposed by Appellee is left unanswered, although the declaratory judgment act is discussed. True, the declaratory judgment act is procedural but the allegations in Appellant's complaint (Transcript page 27) which for purposes of this appeal must be taken as true present a different factual situation than do the allegations in the complaint in the Justice Court in Cause No. 10-297-C. (Transcript page 3.) The two complaints (Transcript page 3 and page 27) do not involve the same cause of action or claim for relief.

APPELLEE'S ARGUMENT 7.

Appellee then deals with election of remedies (Appellee's brief, page 19) citing certain authorities, the first of which was *U. S. v. Oregon Lumber Co.*, 260 U.S. 290. It should be noted that in the above cited case certain remedies were available to the Government and the case began in a Court of General jurisdiction. Appellee has quoted extensively from the *Oregon Lumber* case in which the plaintiff-government proceeded to judgment. In this action the remedy of reformation and procedure under the declaratory judgment act were not available to Appellant in the Justice Court. When the proceeding came to the District Court on appeal Appellant attempted to amend by adding the additional claims for relief or counts in the full belief that all the matters in dispute between the two parties could be tried in one suit. Appellee then urges that a declaratory judgment asking the contract be declared void is inconsistent with the suit on a contract to enforce the same. Appellant agrees, that at some point an election must be made but the Federal Rules, Rule 8, provide for alternative and inconsistent pleading. No election need be made at the pleading stage. Appellee then urges with some doubt that the doctrine of election of remedies also bars the suit for reformation. (Appellee's brief, page 23.) Again the reply but reformation was not available in the Justice Court and also it is not inconsistent. Appellee conveniently discusses certain cases which hold that a suit on a contract is no bar to a later suit for reformation. (Appellee's brief, page 24.) However, as Appellee has found cases not favorable

he does not favor the court nor the Appellant with the names of such cases. Appellee then discusses *Einsiedler v. Massari*, 78 Atl. 2d 572. The suit in that case went to judgment and the appeal was affirmed. Then the defendant attempted to start a new action seeking reformation. Here Appellant sought reformation in the District Court when the remedy became available for the first time. When not allowed to amend, Appellant filed a new complaint. In *Hennepin Paper Company v. Fort Wayne Corrugated Paper Company*, 153 F. 2d 822, cited by Appellee (Appellee's brief, page 26) the first suit was begun in the District Court and went to judgment, unlike the instant case. Appellant submits that there is no inconsistency between a suit on a contract in the Justice Court for a determination of the meaning of the word "property" and a suit to reform the contract. Although the judgment in the Justice Court was unfavorable to Appellant and the word "property" was interpreted in favor of the Appellee, this should not bar a later suit for reformation where the Appellant is able to prove the necessary facts to entitle him to a reformation. Appellee seems to confuse the doctrine of election of remedies with some theory of election of Courts which he proposes as a logical extension. The doctrine of election of remedies implies that the remedy was available at the time the election was made. Appellant attempted to avail itself of all remedies when they became available in the District Court as is shown in the motion for leave to file amended complaint. (Transcript page 20.) Further discussion of the *Hennepin* case by Appellee (Appel-

lee's brief, page 29) does point out the fallacy of Appellee's earlier argument about inconsistent remedies.

APPELLEE'S ARGUMENT 8.

Next Appellee queries "What acts constitute a conclusive election under the doctrine of election of remedies?" (Appellee's brief, page 31.) In proposing this doctrine Appellant assumes that the initial suit based on the complaint (Transcript page 3) was the same as the later suit for reformation. Appellant submits the first suit begun in the Justice Court (Transcript page 3) after the stipulation was entered into became a suit for an interpretation of a contract. Reformation is not the same as interpretation. (*Corbin on Contracts*, Volume 3, page 54.) In *Sadowski v. General Discount Corporation*, 81 F. Supp. 381, plaintiff lost a suit on a contract, then brought a suit to reform. It was held in that the first suit was not *res judicata* and apparently no election of remedies had been made as the two suits were not inconsistent. This case was affirmed in 183 F. 2d 592 allowing the second suit where the Court said the second suit to reform should be allowed; the ruling was partially based on the fact that under Michigan Law the Courts of Law and the Courts of Equity were separate. Here Appellant is faced with partially the same problem. The Justice Court is a Court of limited jurisdiction and certain types of suits, namely, the equitable suits are not allowed. (Opening brief, page 8.)

APPELLEE'S ARGUMENT 9.

Appellee next queries "Do the Federal Rules of Civil Procedure bar Appellant from maintaining A-13,503?" (Appellee's brief, page 36.) Appellee apparently has no answer to this question either but asserts (Appellee's brief, page 42), this Court should affirm the dismissal of the complaint based on "logic" "and good policy". Appellee submits that there is every reason to avoid piecemeal litigation. Had the District Court not ruled at Appellee's urging that the complaint could not be amended there would still only be one case. It would seem part of Appellee's vexation is at his own doing.

CONCLUSION.

As Appellee has not sustained the burden of upholding the District Court's dismissal of Appellant's action, it is urged that the District Court be reversed and the cause remanded and Appellee be required to answer.

Dated, Anchorage, Alaska,

May 8, 1958.

Respectfully submitted,

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No. 15,788

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLEE.

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No. 15,788

IN THE

**United States Court of Appeals
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Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

The District Court had jurisdiction over this matter by virtue of 48 U.S.C.A. 101. This court has jurisdiction over this Appeal by virtue of 28 U.S.C.A. Sections 1291 and 1294 (2).

STATEMENT OF THE CASE.

This litigation arose from a contract dated May 18, 1955, entered into by appellant and appellee (TR 6-8), the tenor of which is: That appellee could tie onto the sewer line of appellant and, in consideration for this service would pay appellant, in lieu of taxes, what

taxes on appellee's property would be if appellee were within the city limits of appellant. The word "property" was not defined in the contract. Proceeding under the contract, appellee installed the sewer at its own expense. Appellant did not. Appellant is in error, in its statement of the case, to the effect that the parties stipulated that the sewer line was installed by the City (TR 12; IV of Stipulation).

At assessment time and after the sewer line installed by appellee was put to use, appellant assessed appellee for real property taxes and also for personal property taxes. Appellant did and does contend that appellee is liable for both real and personal property taxes.

Appellee paid the real property taxes but did and does deny liability for personal property taxes.

A dispute having arisen as to liability for personal property taxes, appellant brought an action to enforce the contract, as interpreted by appellant, which was designated Civil Action No. 10-297-C in the Justice Court for the Anchorage Precinct of Alaska (TR 3-9). The substance of appellee's answer to the complaint in 10-297-C was to admit the complaint except to deny liability for personal property taxes (TR 10-11).

To expedite the trial of 10-297-C, appellant and appellee entered into a stipulation (TR 12-17), the substance of which was that the sole question to be determined was whether or not "property" as used in paragraph III of the agreement of May 18, 1955, means real property alone or real and personal property.

At the trial of 10-297-C, the Justice Court considered not only this stipulation of appellant and appellee; but it also heard oral testimony of George C. Shannon and B. W. Boeke, the city manager and clerk, respectively, of appellant, and George D. Jackson, president of appellee, as to the intent of the parties at the time of entering the agreement of May 18, 1955. It was impossible to get this testimony into this record on appeal, because the Justice Court is not a court of record; however, in order that this court might be fully informed, counsel for appellant and appellee have stipulated that this court may consider the fact that, in 10-297-C, George C. Shannon and B. W. Boeke testified that the intent of the parties was that "property" meant real and personal property and George D. Jackson testified that, the intent of the parties was that "property" meant real property alone.

Thus arose the first question, namely: Is appellee responsible to pay appellant an amount equal to real property taxes alone or an amount equal to real and personal property taxes?

From Judgment entered in favor of appellee in 10-297-C, appellant appealed to the District Court in Anchorage, and that appeal is still pending; therefore, the final determination of the above question is yet to come.

Being appealed to the District Court, 10-297-C was redesignated Civil Action No. A-13,001 in the District Court.

In A-13,001, appellant then sought to amend its complaint so as to seek additional forms of relief, namely, reformation of the contract of May 18, 1955, to the effect that "property" means real and personal property and a declaratory judgment enabling appellant to avoid the contract (TR 19-26).

The second question then arose, namely: Can, under the laws of this Territory, such new and additional forms of relief be sought for the first time after appeal from a justice court?

The District Court said, "No;" and denied the amendment (TR 26).

It is noteworthy that the Order denying the amended complaint was entered June 14, 1957 (TR 26); whereas, notice of this appeal was not given until October 7, 1957. Such illustrating the period of time over which appellant has vexed appellee through litigation.

Having been denied the right to amend, appellant thereafter initiated in the District Court in Anchorage, Civil Action No. A-13,503 (TR 27-32), in which appellant sought essentially the same relief as it sought in its attempted amendment in A-13,001, namely: A reformation of the contract of May 18, 1955, to the effect that "property" means real and personal property instead of real property alone, and a declaratory judgment to the effect that appellant was not bound by said contract of May 18, 1955.

Appellee's motion to dismiss the complaint in A-13,503, although contested by appellant, was successful and resulted in a judgment of dismissal with preju-

dice, September 12, 1957, from which this appeal is taken (TR 32-35). (The Judgment of September 12, 1957, was erroneously labeled "Motion and Judgment of Dismissal with Prejudice").

The entry of this judgment of dismissal in A-13,503 gives rise to the questions to be determined on this appeal, the primary question being whether or not the judgment below should be affirmed, namely:

1. Should a judgment be reversed because the stated reason for its entry is erroneous?

2. As a matter of the policy favoring the expeditious determination of disputes between a single plaintiff and a single defendant, should the judgment below be affirmed?

3. Does the pendency of A-13,001 bar appellant from the reformation relief sought in A-13,503?

4. Is appellant estopped from maintaining A-13,503?

5. Has appellant waived its right to maintain A-13,503?

6. Are there multiple causes of action here or but a single cause of action and multiple remedies?

7. Does the doctrine of election of remedies bar appellant from maintaining A-13,503?

8. What acts constitute a conclusive election under the doctrine of election of remedies?

9. Do the Federal Rules of Civil Procedure bar appellant from maintaining A-13,503?

10. Is appellant barred from maintaining A-13,503 by virtue of the doctrine of *res judicata*?

ARGUMENT.

SHOULD A JUDGMENT BE REVERSED BECAUSE THE STATED REASON FOR ITS ENTRY IS ERRONEOUS?

With respect to appellant's argument I, appellee is confused as to the results sought to be obtained by appellant.

The prayer in appellant's brief (Appellant's Brief p. 16) does not request a reversal of the ruling of the District Court on the motion of appellant to amend its Complaint in A-13,001; and appellant's argument No. I seems directed to the necessity of including items 4 and 5 of its designation of record (Motion for Leave to File Amended Complaint and Amended Complaint Accompanying Motion, plus Minute Order Denying Leave to File Amended Complaint) in order that this court might have the background and information necessary to determine this appeal. Appellee has no objection whatever to this court's considering items 4 and 5 in determining this appeal. However, in appellant's first statement of points relied on (TR 37) and his first specification of error (Appellant's Brief p. 4) and the title to his first argument (Appellant's Brief p. 5) appellant indicates that it desires this court to rule on whether or not the District Court erred in refusing appellant permission to amend its complaint in A-13,001. Appellee submits that such question is not, however, before this court for determination because of the reasons stated in appellee's

objection to appellant's designation of record on appeal and supporting memorandum (TR 43-45).

Appellee interprets appellant's brief, all three of the arguments contained therein, as being to the effect that the judgment appealed from should be upset because of the reason stated by the District Court for entering the judgment, to-wit, *res judicata*. If this interpretation is correct, appellee cannot see how the brief of appellant can be of any aid to this court. The reason stated by the District Court for entering the judgment appealed from is immaterial. The important point is whether or not the judgment appealed from is correct, irrespective of the reasons stated by the district judge for entering the judgment he did, whether the reason be stated in a minute order (TR 34) or otherwise (TR 36).

"In the review of judicial proceedings the rule is settled, that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208; *U.S. v. American Railway Express Co.*, 265 U.S. 425; *U.S. v. Holt State Bank*, 270 U.S. 49, 56; *Langnes v. Green*, 282 U.S. 351; *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239; cf. *U.S. v. Williams*, 278 U.S. 255 . . ."

Helvering v. Gowran, 302 U.S. 238 at 245.

"In that connection, the reasons given therefor by the court, whether right or wrong, are unimportant because: 'A judgment will not be reversed merely because the court gave a wrong reason for the rendition thereof.' *Kelley v. Wehn*,

63 Neb. 410; 88 N.W. 682. . . . As held in *Kanally v. Bronson*, 97 Neb. 322, 149 N.W. 781: 'A proper judgment under the pleadings and the evidence will not be reversed on appeal merely because the trial court did not give the right reason for the decision' . . ."

Sopcich v. Tangeman, 45 N.W. 2d 478 at 481.

"it (the opinion) cannot prevail against the final order or decision . . . The presumption exists that all the facts in a record bearing upon the points decided have received full consideration by the court, whether all, a part, or none of these facts are mentioned in the opinion. . . ." (Parentheses ours.)

21 *C.J.S.* 414, Courts, Section 222(b).

For further authority on this same point, see: 49 *C.J.S.* 51-52, Judgments, Sec. 22; *Kipp v. Clinger*, 106 N.W. 108; *First National Bank in Wichita v. Luther*, 217 Fed. 2d 262 at 266; *People ex rel Holzapple v. Ragen*, 117 N.E. 2d 390 at 393, Certiorari denied 347 U.S. 963; *Brown v. Allen*, 344 U.S. 443 at 459; 30A *Am. Jur.* 169, Judgments, Sec. 15; 3 *Am. Jur.* 563, Appeal and Error, Sec. 1008; innumerable cases in Volume 2 *Sixth Decennial Digest*, 478-483, Key number: Appeal and Error 854 (2).

AS A MATTER OF THE POLICY FAVORING THE EXPEDITIOUS DETERMINATION OF DISPUTES BETWEEN A SINGLE PLAINTIFF AND A SINGLE DEFENDANT, SHOULD THE JUDGMENT BELOW BE AFFIRMED?

Appellant's trail through the courts in connection with the matters involved in this appeal is a long and

devious one. Appellant began a suit to enforce the contract of May 18, 1955, in the Justice Court. Losing, appellant appealed to the District Court (A-13,001); and that action is still pending there. Appellant then sought to inject into A-13,001 additional claims for relief in the nature of reformation and declaratory judgment. Having failed in this attempt, appellant brought a separate action (A-13,503) in the same District Court seeking the identical relief of reformation and a declaratory judgment. The subsequent action (A-13,503) having been dismissed, appellant now appeals to this court. Part of the relief requested by appellant on this appeal is the reinstatement of A-13,503 with respect to reformation; however, appellant's prayer in connection with reformation in A-13,503 is that it may have judgment "1. That by decree of this court, the above mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties. . . ." (TR 31). As appellant points out in its brief, such is all it asks in connection with reformation, namely: "That the court reform the instrument according to the intent of the parties, . . ." (Appellant's Brief, p. 13). Appellant does not seek to reform the contract *and* enforce the contract as reformed. This prayer for reformation illustrates more vividly than any other act of appellant the condemnable conduct of appellant in submitting appellee to continuous litigation. Under its prayer, apparently, appellant would like to get the contract reformed and a judgment to that effect. It appears that, armed with this judgment, appellant would then like to bring still an additional law suit to enforce the contract in accordance with the judgment previously obtained.

Appellant's conduct throughout these proceedings can in no way be justified in the light of the liberal joinder and pleadings rules of the Federal Rules of Civil Procedure; and its conduct conclusively establishes appellant's contempt for, and disregard of, every legal principle involved in the doctrines of *res judicata*, election of remedy, estoppel, waiver, circuitous actions, multiplicity of suits, and any other doctrine seeking to expeditiously dispose of controversial matters arising out of a single transaction at a single time.

“The procedural rules are designed to eliminate multiplicity of suits and to dispose of all claims between the parties on one proceeding.”

Vahle v. Markham, 5 F.R.D. 315 at 317.

“State practice to the contrary notwithstanding, the present federal procedure contemplates the disposition at one time of all rights and liabilities arising out of a single event, so far as disposition may be possible and practical.”

Sinkbiel v. Handler, 7 F.R.D. 92 at 97.

“Public policy demands that a multiplicity of suits be not maintained even by a party entitled to maintain them when one suit would suffice. . . .”

Cold Metal Process Company v. United Engineering & Foundry Company, 190 Fed. 2d 217 at 222.

The application of this policy against multiple suits or continuous vexing of the defendant in court is particularly applicable in this case for two reasons:

1. In the case at bar we have a factual situation where appellant could, at the time it brought its suit in the Justice Court, have sued in the District Court, not only to enforce the contract but to reform the contract and enforce it as reformed and also for a declaratory judgment. Appellee feels that it is of primary significance that these three rights to relief were coexisting and that they arose out of a single transaction.

(a) As a matter of fact, if these demands of appellant had arisen below by way of counterclaim and not complaint, joinder would have been compulsory.

“A pleading shall state as a counterclaim any claim which at a time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence and is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.” (Rule 13 (a), F.R.C.P.)

It is noteworthy that the language of Rule 13 (a) is in terms of “claims” and not in terms of causes of action.

2. Affirming the judgment below, will in no way injure appellant. A-13,001 remains pending, and appellant may there have determined in full its rights under the contract of May 18, 1955 that

it made with appellee. No doubt appellant will contest this statement on the grounds that, while A-13,001, will determine the amount of money due appellant from appellee, nevertheless, this contract of May 18, 1955, is a burden on appellant; and appellant is entitled to a decision as to whether or not the contract can be avoided. In the first place, such a contention is immaterial. If the contract is valid and binding, it makes no difference whether or not appellant considers it a desirable contract. Although the question of avoidance is not before this court, appellee submits that this record reflects on its face the fact that appellant, obviously, cannot successfully maintain a suit to avoid the contract of May 18, 1955, in view of the fact that it has, for several years, accepted the monetary benefits of the contract. Further, the contract was drawn by appellant and is to be construed, therefore, against appellant. Appellant would be estopped.

The granting of a declaratory judgment is discretionary and should be refused if there is nothing to be gained by it (*Maryland Casualty Co. v. Consumers Finance Service of Pa.*, 101 Fed. 2d 514; *Libberman v. Merkin*, 2 F.R.D. 315). Appellee will dwell in detail, subsequently in this brief, on the contention that the reformation relief sought in A-13,503 is identical to the relief of enforcing the contract in A-13,001; except that it appears appellant intends to obtain it by initiating still another law suit (p. 9 ante).

If, therefore, appellant cannot avoid its contract, to permit an action for a declaratory judgment would be futile; and, if appellant can obtain all the relief in A-13,001 that it seeks by reformation in A-13,503, the determination of this appeal against appellant can in no way work a detriment to appellant.

DOES THE PENDENCY OF A-13,001 BAR APPELLANT FROM THE REFORMATION RELIEF SOUGHT IN A-13,503?

Although it is, admittedly, at the discretion of the court, where two identical actions are pending, whether or not one will be dismissed or merely stayed while the other is completed, appellant submits that the better policy, where there are identical parties, subject matter and relief sought, is to dismiss the subsequent action. As will be spelled out herein, the reformation sought in A-13,503, is identical to the relief sought in A-13,001. The parties and the subject matter are the same. A-13,001 is pending. A-13,503 has been dismissed; therefore, at least with respect to reformation, this court should affirm the judgment below in A-13,503 (1 *C.J.S.* 61, Abatement and Revival, Secs. 36 and 37; 1 *C.J.S.* 119, Abatement and Revival, Sec. 81; *Wheelis v. Wheelis*, 226 S.W. 2d 224; *Sears, Roebuck and Company v. Metropolitan Engravers*, 245 Fed. 2d 67).

IS APPELLANT ESTOPPED FROM MAINTAINING A-13,503?

The doctrine of election of remedies will be discussed subsequently. Some courts will not recognize this doctrine but, instead, rely upon the doctrine of

estoppel. The majority of courts distinguish between the two doctrines. When considering the doctrine of estoppel, the courts require a showing that failure to require a party to abide by the remedy elected will cause a real injury to the other party (28 *C.J.S.* 1059).

Appellee submits that it should prevail on this appeal under either the doctrine of election of remedies or that of estoppel.

In connection with estoppel, the primary point is that appellee had a right to rely upon the stipulation entered into by appellant and appellee to the effect "that . . . the sole question to be determined herein is whether or not the word 'property' as used in said contract means real property or whether it means real and personal property" (TR 13; paragraph VI of Stipulation). In the light of this stipulation, appellee had a right to believe that the judgment in the Justice Court would conclude this matter. It was appellant that chose the Justice Court. Certainly, appellee had the right to believe and reasonably rely upon the matter not proceeding beyond an appeal from the Justice Court to the District Court, the now pending action of A-13,001.

Instead of abiding by its stipulation, and by way of further injury to appellee, appellant submits appellee to the continued annoyance and expense of continuous and even duplicitous legal proceedings: first, in opposing the amendment to the complaint in A-13,001 (unjustifiable in the light of the above quoted stipulation and in the further light of the fact that ap-

pellant must be presumed to know the law) (Sec. 68-9-14, *A.C.L.A.* 1949; TR 6-7) and therefore knew it had no chance of success in seeking the amendment; and, second, the annoyance, expense and inconvenience throughout all the proceedings in A-13,503, including this appeal.

The above stated applies to both the remedies of reformation and declaratory judgment.

HAS APPELLANT WAIVED ITS RIGHT TO MAINTAIN A-13,503?

Appellee submits that the stipulation just quoted in connection with estoppel (TR 13) is an excellent basis for a decision that appellant has waived its right to maintain A-13,503.

“Section 68-2-1. Actions within Jurisdictions: Judgments on Confession.

A justice's court has jurisdiction, but not *exclusive*, of the following actions:

First. For the recovery of money or damages only when the amount claimed does not exceed \$1000.00; . . .” (Emphasis ours.)

Sec. 68-2-1, *A.C.L.A.* 1949.

“Where a counterclaim exceeding the jurisdictional limit is pleaded, the jurisdiction of the justice's court is not ousted, but the prevailing defendant cannot, besides defeating plaintiff's claim, be awarded more than jurisdictional amounts; he waives any balance.”

Notes of Decisions 3 *A.C.L.A.* 2454;

Bennett v. Forrest, 69 F. 421, 1 Alaska Rep. 721-722.

By a like token, where appellant had available to it, equitable and statutory remedies (reformation and declaratory judgment) over which only the District Court had jurisdiction, and particularly when these remedies arose out of the same transaction and existed concurrently with the remedy of enforcing the contract, by initiating action in a Justice Court for less than appellant claimed to be entitled, it waived the overage.

ARE THERE MULTIPLE CAUSES OF ACTION HERE OR BUT A SINGLE CAUSE OF ACTION AND MULTIPLE REMEDIES?

There seems to be some confusion as to whether or not the differences between appellant and appellee are concerned with multiple causes of action or merely multiple remedies (Appellant's Brief p. 12).

It may be contended that there are two causes of action, one to enforce the contract, which embodies not only the remedy of reformation, but the remedy of enforcement, and a second cause of action for a declaratory judgment; however, appellee believes that the law establishes that the procedure for a declaratory judgment is not a cause of action but merely a procedural remedy. Indeed, the cases hold that a proceeding for a declaratory judgment will lie irrespective of the existence of a cause of action (*Maryland Casualty Company v. Hubbard*, 22 Fed. Sup. 697).

The present declaratory judgment statute, (28 U.S.C.A. Sec. 2201) is a descendant from the old Section 400 of the same Title which reads:

“In cases of actual controversy, except with respect to federal taxes, the courts of the United

States shall have power upon petition, declaration, complaint or other appropriate pleadings to declare rights and other legal remedies of any interested party petitioning for such declaration, whether or not such further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." (48 Stat. 955; 49 Stat. 1027.)

The present Federal Declaratory Judgment Statute (28 U.S.C.A. Sec. 2201) is, and since the passing of the old Sec. 400, has been held to be, a procedural statute which provides an additional remedy for use in those controversies over which District Courts already have jurisdiction (*American Chemical Paint Co. v. Dow Chemical Co.*, 161 Fed. 2d 956, rehearing denied, 164 Fed. 2d 208; *Caven v. Clark*, 78 Fed. Sup. 295; *Sachs v. Cluett, Peabody & Company*, 91 Fed. Sup. 37; *Berlitz School of Languages of America v. Donnelley and Suess*, 84 Fed. Sup. 75; *Donnelley v. Mavar Shrimp and Oyster Co.*, 190 Fed. 2d 409 at 410).

The act is to determine rights prior to the filing of a regular action and to prevent multiplicity of litigation (*Security Insurance Co. v. Jay*, 109 Fed. Sup. 87; *Scott-Burr Stores Corp. v. Wilcox*, 194 Fed. 2d 989).

The declaratory judgment statute merely enlarges the range of remedies (*Pa. Railway Co. v. U.S.*, 111 Fed. Sup. 80).

Speaking of the various declaratory judgment acts, it is said:

"... that the effect is simply to make a controversy over a legal or equitable right or title jus-

tlicable at an earlier state of the controversy than that which gave rise to a cause of action at common law, or to enable the normal defendant to institute the proceedings.

In general, it may be said that declaratory judgment acts are designed to supply former deficiencies in legal procedure and to furnish a full and adequate remedy where none existed before, rather than to supplant or displace pre-existing and effective remedies or to provide a substitute for other regular actions. . . .”

16 *Am. Jur.* 281, Declaratory Judgments, Sec. 7.

“Jurisdiction under a declaratory judgment act is not confined to cases in which the parties or one of them have a cause of action apart from that conferred from the act itself. . . . To hold that there must be a ‘cause of action’ as that term is ordinarily used would defeat the fundamental purpose and destroy the real value of the *remedy*.” (Emphasis ours.)

16 *Am. Jur.* 286, Declaratory Judgments, Sec. 12.

From the date of the initial enactment of the Federal Declaratory Judgment Statute (Old Sec. 400, *supra*) to the present Section 2201, the cases have uniformly held that a declaratory judgment is procedural and remedial and, hence, not a cause of action at all. (*Reliance Life Ins. Co. v. Burgess*, 112 Fed. 2d 234; *Love v. U.S.*, 108 Fed. 2d 43; *Ohio Casualty Ins. Co. v. Marr*, 98 Fed. 2d 973; *Ohio Casualty Ins. Co. v. Richards*, 27 Fed. Sup. 18; *Sinclair Refining v. Burroughs*, 133 Fed. 2d 536).

Some of the cases contain even stronger language to the effect that a declaratory judgment has nothing to do with the creation of a right, a thing to be protected by a cause of action and continue that the declaratory judgment merely establishes a new remedy for existing rights (*Aralac, Inc. v. Hat Corp. of America*, 166 Fed. 2d 286; *American Chemical Paint Co. v. Dow Chemical Co.*, *supra*; *Davis v. American Foundry Equipment Co.*, 94 Fed. 2d 441; *American Casualty Co. of Reading, Pa. v. Howard*, 80 Fed. Sup. 983; *Sunshine Mining Co. v. Carver*, 34 Fed. Sup. 274).

**DOES THE DOCTRINE OF ELECTION OF REMEDIES BAR
APPELLANT FROM MAINTAINING A-13,503?**

The doctrine of election of remedies is a rule of policy designed to prevent vexatious litigation (28 *C.J.S.* 1058, Election of Remedies, Sec. 1).

The basis of the rule is that one shall not be vexed twice for one and the same cause (28 *C.J.S.* 1060).

Stated differently, the rule is based upon prohibiting one from occupying inconsistent positions; in other words, one shall not be allowed to both approve and reprobate (28 *C.J.S.* 1058).

The doctrine is recognized by both state and federal courts (28 *C.J.S.* 1058, *supra*; *U.S. v. Oregon Lumber Co.*, 260 U.S. 290; *Durham v. New Amsterdam Casualty Co.*, 208 Fed. 2d 342; *U.S. v. Bernstein*, 149 Fed. Sup. 568; *First Nat'l Bank in Wichita v. Luther*, *supra*; *Sears, Roebuck and Co. v. Metropolitan Engravers*, *supra*).

“All actions which proceed on the theory that plaintiff has ratified an authorized transaction are inconsistent with actions which proceed on the theory that plaintiff has repudiated such transaction.”

28 *C.J.S.* 1076, Election of Remedies, Sec. 9.

See also:

Minneapolis Nat'l Bank of Minneapolis, Kansas v. Liberty Nat'l Bank of Kansas City, 72 Fed. 2d 434;

Butler Bros. v. Hames, 97 S.W. 2d 622.

Rescission and reformation are inconsistent (*Feit v. Reichert*, 189 Pac. 854); hence, the relief of declaratory judgment asking that appellant be allowed to avoid the contract or to have the contract declared void is inconsistent with A-13,001 to collect money allegedly due under the contract, that is, to enforce the contract of May 18, 1955.

In *U.S. v. Oregon Lumber Co.*, *supra*, the court was concerned with an action brought by an appellant against appellee seeking damages for the fraudulent acquisition of land by patent from the government. The appeal to the Supreme Court was from the Ninth Circuit. Previously, appellant had lost the suit against the appellee which sought to set aside the patent and establish ownership of the land in appellant, the United States. The prior suit was lost by the United States as a result of a plea in bar of the statute of limitations. The court held for appellee and based its decision on the doctrine of election of remedies (*U.S. v. Oregon Lumber Co.*, 260 U.S. 290).

“Upon the facts stated the sale was voidable (Moran v. Horsky, 178 U.S. 205, 212), and the plaintiff in error was entitled to disaffirm the same and recover the land or affirm it and recover damages for the fraud. It could not do both. Both remedies were appropriate to the facts, but they were inconsistent since the first was founded upon a disaffirmance and the second upon an affirmation of a voidable transaction. Robb v. Vos, 155 U.S. 13, 43; Connihan v. Thompson, 111 Mass. 270, 272. 2 Black on Recision and Cancellation, Sec. 562, and cases cited. The rule is applicable to the government in cases where patents have been procured by fraud. U.S. v. Kolenko, 366 Fed. 180, 183. Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based on one or the other of these inconsistent conclusions. Robb v. Vos, *supra*.”

U.S. v. Oregon Lumber Co., supra, at 294-295.

“But here in the equity suit, the plaintiff in error upon the coming in of defendant’s plea of the statute of limitations made no offer to amend or request to transfer the case to the law docket, but proceeded to trial and judgment upon the original bill, with knowledge of all of the facts for more than six years prior to the filing of its bill. Defeated in its equity suit, it brought its action at law upon the same allegations of fact. We think it is not admissible to thus speculate upon the action of the court, and having met with an adverse

decision, to again vex the defendant with another inconsistent action upon the same facts.”

U.S. v. Oregon Lumber Co., supra, at 296.

“The case of *Bistline v. U.S.*, 299 Fed. 546, relied upon by the plaintiff in error, is not in conflict with this conclusion. That was an action by the government to recover damages for the fraudulent acquisition of certain public lands. A prior suit had been brought in equity to cancel the patent, but the defendant’s answer showed that the land had been conveyed to persons not made parties to the suit. The government therefore promptly dismissed its suit in equity and, on the same day, commenced the action at law for damages. If, in the instant case, a like course had been followed upon the coming in of defendant’s answer pleading the statute of limitations, the case just referred to would have been in point.”

U.S. v. Oregon Lumber Co., supra, at 297.

“The distinguishing feature of the instant case is that after the coming in of the answer, pleading the statute of limitations, and the plain warning thus conveyed of the danger of continuing the equity suit further, the plaintiff in error persisted in pursuing it to final judgment, instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy not subject to the same defense. The doctrine of election of remedies and that of *res judicata* are not the same, but they have this in common, that each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause. The policy embodied in this

maxim we think requires us to hold that the plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and that it is now estopped from maintaining the present inconsistent action."

U.S. v. Oregon Lumber Co., supra, at 301.

Proceeding under the belief that a declaratory judgment is merely an additional remedy, appellee submits that the doctrine of election of remedies is applicable to this appeal and that, therefore, an action for declaratory judgment to the effect that a contract is void, being inconsistent with a pending action to enforce the contract (A-13,001) is barred by virtue of the doctrine.

One cannot both affirm and disaffirm (12 *Sixth Decennial Digest* 872 *et seq.*, Election of Remedies Key No. 3 (2)).

As previously stated a man shall not be allowed to approbate and reprobate.

Appellee submits that there can be no question but that the remedy of declaratory judgment seeking to disaffirm the contract, being inconsistent with the remedy to enforce the contract (A-13,001 pending in the District Court and 10-297-C having been decided in the Justice's Court) is barred by the doctrine of election of remedies (see also 28 *C.J.S.* 1063, Election of Remedies, Sec. 3a).

There is more doubt as to whether or not the doctrine of election of remedies will bar the relief of

reformation; however, appellee submits that the question has already been decided favorably to appellee so far as this court is concerned.

The cases which hold that an action to enforce the contract is no bar to a subsequent action to reform it base their reasoning on the ground that there is nothing inconsistent in the remedies seeking enforcement and the remedies seeking to reform in that they both seek to affirm the contract. This reasoning evades the issue, and the conclusion of these cases is possible only because the courts have the word "affirm" as the focal point of their reasoning.

The more logical approach is that nothing could be more inconsistent than attempting to enforce something "as is" (A-13,001 and 10-297-C) and attempting to enforce something "as it is not" (reformation in A-13,503).

In any event, appellee contends that the cases holding that there is no inconsistency in suing to enforce a contract and subsequently suing to reform it are not in point. Appellant seeks to enforce the contract in A-13,001 and sought to enforce it in 10-297-C. In the matter on appeal (A-13,503) appellant seeks to reform the contract; *but appellant does not seek to enforce the contract as reformed* (TR 31; Appellant's Brief, p. 13). The cases holding no inconsistency are concerned with an action to not only reform but to enforce it as reformed.

"According to some decisions, where a mistake has been made in a contract, of such a nature and

under such circumstances as to give rise to the equitable right to have the contract reformed, the prosecution to judgment of an action at law for damages for breach of the contract is inconsistent with and a bar to, a subsequent suit for the reformation of the contract. Likewise, a pending suit on a contract as written precludes a party from subsequently seeking reformation thereof.”

28 *C.J.S.* 1073, Election of Remedies, Sec. 7.

Einsiedler v. Massari supports this doctrine. Massari sued Einsiedler for the balance due on a contract. Einsiedler defended by affirmatively pleading a loan agreement and a security trust agreement, the operation of which was to pay the balance on the contract on which Massari based his claim. Massari won. Einsiedler brings the present action by way of reformation of the contract on which Massari recovered in order to incorporate into that contract the loan agreement and the security trust agreement previously pleaded by Einsiedler. The court refused and denied the action of reformation. The case is an excellent one in discussing the policy involved. (*Einsiedler v. Massari*, 78 Atl. 2d 572).

It is true that the court in the *Massari* case said that it bases its decision on *res judicata*; however, as a matter of fact, *res judicata* cannot apply except upon the principle that a matter is *res judicata* as to not only what was decided but as to all that could have been decided between the parties. The policy on which the court based its decision is applicable to the present case now on appeal before this court; and that

policy is to the effect that, there being liberal rules of joinder in pleading and the abolition of the distinction between courts of law and courts of equity, Einsiedler had an opportunity not only to plead the loan agreement and security trust agreement by way of an affirmative defense in the original suit brought by Massari, but, at that time, he had an opportunity to seek the reformation he now seeks in the subsequent action.

As previously pointed out, the *Massari* case supports the contention that appellant's conduct is particularly unjustifiable in light of the fact that, at the time appellant instigated action in the Justice's Court, it had a choice of forums between the Justice Court and the District Court; and there were coexisting at that time, the remedies to enforce the contract, to reform the contract and enforce it as reformed, and for a declaratory judgment. Instead of seeking these three claims for relief in the District Court at that time, appellant chose to prosecute this suit in a piecemeal fashion and even now threatens to throw other pieces at appellee in the future, since appellant still does not ask for enforcement of the contract as reformed (TR 31).

One who elects to sue upon a written contract as executed and who prosecutes the action to trial and judgment cannot thereafter bring an action to reform the contract (*Hennepin Paper Co. v. Fort Wayne Corrugated Paper Co.*, 153 Fed. 2d 822).

The *Hennepin* case involves a plaintiff who sued on a contract, as orally modified, which provided that de-

fendant was to purchase from plaintiff specified amounts of paper. Plaintiff lost. Plaintiff then brought the present action wherein "the plaintiff is seeking a reformation of the written contract under date of July 1, 1941, so as to make that contract conform to the 'true intent and understanding of both parties' to the contract. . . ." (*Hennepin* case, *supra* at 824). This case is directly in point, although the factual situation in the matter on appeal before this court is such as to spell out an even stronger case for this appellee than the defendant had in the *Hennepin* case. (As will be pointed out in a subsequent section as to what constitutes a conclusive election under the doctrine of election of remedies, appellant has not only elected the remedy but tenaciously refuses to relinquish it.)

"Under the Federal Rules of Civil Procedure, and under the law of Indiana, the plaintiff had the right, in the first action, to, by proper pleading, ask that the written contract of July 1, 1941, be reformed and redrawn, as it is attempting to do in the second action." (Emphasis ours.)

Hennepin case, *supra*, at 825.

By like token, this appellant had all three remedies available to it and the forum of the District Court open to it at the time it initiated the action to enforce the contract in the Justice Court, which action is now pending in the District Court at Anchorage as A-13,001.

"It certainly knew the same facts at the time the district court struck out paragraph V of the complaint in the first cause of action, as it knew at the

time it drafted the complaint in the second action, and it should have filed either an amended complaint or an additional count or paragraph in that action so as to have presented all issues in the same action.”

Hennepin case, supra, at 825.

By like token, when this appellant filed in the Justice Court, all facts concerned with the alleged right to all three remedies were known to this appellant. The appellant sued to enforce the contract, so its claim to recover money under the contract, obviously, was in the mind of appellant. It knew that there was a question of reformation, because it stipulated that the sole question to be decided in the Justice Court was the meaning of the word “property”. Further, it even had its city manager and clerk testify as to the intent of the parties, testimony relevant to nothing more than reformation. Certainly the existence of the Federal Declaratory Judgment Statute was a matter known to the city attorney at the same time. It was only after the appellant lost this action in the Justice Court that it became revengeful and attempted to avoid the contract by seeking amendment in A-13,001 and later initiating A-13,503. By proceeding in the Justice Court, initially, when it knew the Justice Court had no jurisdiction over reformation or declaratory judgment, it is obvious that the only thing appellant sought was money; but, being denied the money, it has undertaken to penalize appellee as much as it possibly can, threatening avoidance and the cutting off of the sewer service and continual, vexatious litigation.

“This it could have done ‘regardless of consistency and whether based on legal or equitable grounds or both.’ Rule 8 (e) (2) Federal Rules of Civil Procedure. The authority to thus have joined its claims is specifically provided for in Rule 18, of the Federal Rules of Civil Procedure as follows: ‘(a) Joinder of Claims. The plaintiff in his complaint * * * may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.’ See also, Burns’ Indiana Statutes, Annotated, 1933, Sec. 2-101, which reads as follows: ‘One form of action.—There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. All courts which are vested with jurisdiction both in law and equity may, to the full extent of their respective jurisdictions, administer legal and equitable remedies, in favor of either party, in one and the same suit, so that the legal and equitable rights of the parties may be enforced and protected in one (1) action.’ . . .

“Therefore, it seems clear that the plaintiff predicated his first suit on the written contract plus the alleged subsequent oral modification of one of its terms. . . . It made its election in the first action and it cannot now, in a separate action, assume an entirely different and inconsistent position in an effort to have the same written contract reformed. As heretofore observed, such effort, if it desired a reformation of contract, should have been undertaken in the first action. . . .

“The Supreme Court of Indiana in the case of *Royal Ins. Co. v. Stewart*, 190 Ind. 444; 129 NE 853, 857, said ‘Where a party elects to sue on a written contract as executed, and the action proceeds to trial and judgment, he cannot thereafter bring an action to reform the contract. 2 Black on Judgments, Sec. 632 * * *. Again, in the case of *Knight v. Electric Household Utilities Corp.*, 133 N.J. Eq. 87, 30 Atl. 2d 585, 588, affirmed 134 N.J. Eq. 542, 36 Atl. 2d 201, the Court said, ‘Whether a plaintiff is precluded by the judgment, depends upon the extent to which the legal and equitable remedies have been merged in the state where the judgment is rendered. Restatement—Judgments, Sec. 66. The judgment barred the suit for reformation if the plaintiff could have obtained reformation in his original action on the contract. *Royal Ins. Co. v. Stewart, Inc.* 190 Ind. 444, 129 N.E. 853. But where the law court cannot give equitable relief, the judgment is not a bar. *Northern Assurance Co. v. Grand View Bldg. Assoc.*, 203 U.S. 106, 27 Sup. Ct. 27, 51 L. Ed. 109. . . .’

“Not only under the Federal Rules of Civil Procedure, but under the law of Indiana, the plaintiff could have, in the first action, sought a reformation of the contract, and *it was its duty* to have done so if it desired to litigate that question. Not having done so, and having sought an entirely different and inconsistent remedy in that action, it cannot now maintain the second action. The district court properly granted the motion of defendant for a summary judgment.

“The judgment of the district court is affirmed.”
(Emphasis ours.)

Hennepin case, supra at 825-827.

What better authority for the application of the doctrine of election of remedies or of estoppel or of an outright waiver, irrespective of appellee's right to rely upon the stipulation of appellant to the effect that the sole question is the definition of the word "property", could one have than the foregoing authority? (Supporting the *Hennepin* case, see: 49 *A.L.R.* 1513 at 1515-1517; *Leaksville Light & Power Co. v. Ga. Casualty Co.*, 137 S.E. 817.)

WHAT ACTS CONSTITUTE A CONCLUSIVE ELECTION UNDER THE DOCTRINE OF ELECTION OF REMEDIES?

As to what constitutes an act sufficiently decisive to prompt a court to hold, with respect to the doctrine of election of remedies, that an election has, in fact, been made, there is a wide divergence of authority.

"The authorities are by no means harmonious as to what acts constitute a conclusive election. . . . it may be stated as a general rule that any decisive act of a party, with the knowledge of his rights and of the facts, indicating an intent to pursue one remedy rather than the other, determines his election in case of conflicting and inconsistent remedies. . . .

"Any unambiguous act consistent with one remedy and inconsistent with others will generally be deemed conclusive evidence of an election. . . .

"According to some decisions, an election has matured only when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other. According to other authority, a deliberate choice or election is

binding even though no positive disadvantage or injury has resulted to the other party, and, as appears *infra* Sec. 15, the mere commencement of an action may be sufficient to preclude the subsequent pursuit of another remedy.”

28 *C.J.S.* 1077 to 1079, Election of Remedies, Sec. 11.

Some cases hold that a party is not bound by his election unless he obtains some advantage by his first action, such as judgment in his favor (*Morlan v. Lucey Mfg. Corp.*, 7 Fed. 2d 494, affirmed 14 Fed. 2d 920, certiorari denied 273 U.S. 744, 47 S.Ct. 344, 71 L.Ed. 870).

As noted in the above citation, the Supreme Court of the United States denied certiorari; however, when the matter was actually considered by the Supreme Court, it had this to say:

“ ; ... and to hold that plaintiff may then invoke another and inconsistent remedy is not to recognize an exception to the general operation of the doctrine of election of remedies but to deny the doctrine altogether. Here, upon the facts as stated in the bill in equity and later in the action at law, both remedies were available to the plaintiff in error. In electing to sue in equity plaintiff in error proceeded with full knowledge of the facts, but it underestimated the strength of its cause, and if that were sufficient to warrant the bringing of a second and inconsistent action the result would be to confine the defense of an election of remedies to cases where the first suit had been won by plaintiff and to deny it in all cases where plaintiff had lost. But the election was

determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court. See, for example, *Bolton Mines Co. v. Stokes*, 82 Md. 50, 59."

U. S. v. Oregon Lumber Co., *supra*, at 301.

The *Oregon Lumber* case is still good law.

There is an extensive annotation on this subject of what constitutes a conclusive election in 6 *A.L.R.* 2d 10.

Irrespective of the divergence of authority, there seems to be no doubt that the prosecution of one remedial right to judgment or decree, whether the judgment or decree is for or against the plaintiff, is a decisive act which constitutes a conclusive election, and that is exactly what appellant, as plaintiff, did in 10-297-C (28 *C.J.S.* 1087, Election of Remedies, Sec. 14).

"... it is uniformly held that prosecution of a remedy to a judgment on the merits is a conclusive choice precluding the plaintiff from thereafter maintaining an inconsistent remedy, and this rule has been held applicable even though the judgment was against the plaintiff..."

6 *A.L.R.* 2d 11.

The Federal courts have extended the doctrine well beyond the requirement of pursuing a remedy to judgment.

Some even prohibit the amendment of a complaint in such a way as to set forth, by amendment, a remedy inconsistent with that sought in the original com-

plaint (*U.S. v. Bernstein, supra; Warner v. Godfrey*, 186 U.S. 365).

In *Durham v. New Amsterdam Casualty Co.*, it was held that the obtaining of a motion to set aside a judgment on grounds that the judgment was obtained by fraud, *without any further proceedings* in that action whatsoever, constituted a bar to a proceeding in a separate action where damages for the fraud were sought. The court held that the obtaining of the order, setting aside the judgment as having been obtained by fraud, constituted an election to ignore the fraud and proceed on the merits; and that, therefore, the right to damages by fraud was lost (*Durham v. New Amsterdam Cas. Co., supra*).

To appellee's thoughts, the most reasonable and logical position is that stated in the *Oregon Lumber Co.* case, namely:

"... *Any decisive action by a party*, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions. *Robb v. Vos, supra.*" (Emphasis ours.)

U. S. v. Oregon Lumber Co., supra, at 295.

Appellee does not see how anyone could act more decisively toward electing a remedy than appellant has acted. Appellant has proceeded even beyond the obtaining of a judgment in the Justice Court. It has appealed that judgment to the District Court, and

that action is still pending. As a matter of fact, the reformation relief that appellant seeks is, in fact, no more than an added attempt to get a favorable judgment in A-13,001. The reformation sought is to spell out the word "Property" as meaning real and personal property. This is the sole issue in A-13,001 and the identical issue decided over a year ago January 2, 1957, (TR 18) by the Justice Court in 10-297-C. As stated, presumably, if appellant were successful in obtaining the reformation, appellant would then harass appellee even further by suing on the contract as reformed; otherwise, why reform it?

The issues in the Justice Court resolved themselves into this. If the Justice Court held for appellant and awarded it a monetary judgment, such could have been done only by deciding that "property" meant real and personal property. If the Justice Court held as it did, for appellee, such could be done only by holding that the word "property" meant real property alone. Since the matter is now appealed to the District Court as A-13,001, the District Court is now asked to interpret the meaning of the word property all over again. Appellant is seeking a further determination of the meaning of the word property in asking for reformation in A-13,001. In other words, appellant absolutely refuses to do anything other than attempt to enforce the contract *as interpreted by appellant*. Appellee cannot conceive of evidence more conclusive of an absolute election (see annotation in 6 A.L.R. 2d, particularly at pages 17, 18, 19, 25, 26, 27, 28, 29, 30 and 49).

DO THE FEDERAL RULES OF CIVIL PROCEDURE BAR
APPELLANT FROM MAINTAINING A-13,503?

If we are concerned here with but a single cause of action and three remedies, as appellee believes the facts to be, there is no question of joinder of causes of action, and it is to causes of action that Rule 18 of the Federal Rules of Civil Procedure is primarily directed although that rule speaks in terms of "claims" and not causes of action.

Appellee submits that it goes without saying that (1) seeking monies under a contract and (2) seeking reformation of a contract together with monies under it as reformed are but two remedies arising out of a single cause of action. Although appellant believes not, it is conceivable that a declaratory judgment could be held to be a separate cause of action and not merely a remedy arising out of the same cause of action.

Proceeding on the assumption, which appellee believes to be fallacious, that multiple causes of action are involved, one finds cases to the effect that the joinder mentioned in Rule 18 is permissive but not mandatory.

Although a single cause of action may not be split, failure to join several separate causes of action in a single proceeding, although they *could* all be litigated in the same action, is no bar to subsequent suit on the omitted causes of action (*Velsicol Corp. v. Hyman*, 103 F. Sup. 363; *Leimer v. Woods*, 196 Fed. 2d 828).

Appellee submits that neither of the two last cited cases are in point.

The *Leimer* case is a case under the old Rent Control Act where the government sought to restrain a defendant from overcharging his tenants, asked damages in the nature of rebating the amount of the overcharge, and further asked treble damages as punishment in accordance with the provisions of the act. The defendant asked for a jury trial on the question of damages. The lower court proceeded in equity on the subject of restraint, found such proper, and then held that the equity hearing on restraint settled the damage question too under the doctrine of *res judicata*.

The Appellate Court reversed and stated that the joinder permitted by Rule 18 was not such as to allow a denial of a substantive right, such as a trial by jury on the issue of damages. The court held that such was particularly true in the light of Rule 38 of the Federal Rules of Civil Procedure, permitting separate trials of causes of action joined together. The court said there would have to be a very strong ground indeed to justify a court in proceeding first in equity and denying a right to trial by jury on the question of damages instead of separating the actions, hearing the damage question before a jury and then, if appropriate, proceeding to the equitable matter of restraint.

The case does not really deal with whether or not there was a proper joinder (although it is implied that the joinder is proper) or whether or not a joinder is mandatory or permissive (on which nothing is said). The holding of the case is that a substantive right

cannot be denied a defendant by the application of Rule 18.

The *Velsicol* case deals with a defendant who made a number of discoveries while an employee of plaintiff, and, in violation of his contract of employment, refused to assign to plaintiff the patent applications for these discoveries. The court held that the plaintiff had no obligation to join all of these causes of action in a single suit against the defendant.

The *Velsicol* case deals with causes of action that arose at different times. One cause of action would mature, and the defendant would then enter into another series of acts which would result in another cause of action maturing and so on. This is to be distinguished from the case at bar where all relief sought was available to appellant at the time litigation was initiated in 10-297-C.

Whatever causes of action exist in the present controversy between appellant and appellee, they existed concurrently and arose out of the same transaction. They not only existed concurrently, but they arose concurrently. There was no "actual controversy" within the meaning of the Declaratory Judgment Statute, nor was there any question of reformation until the appellant brought its action in the Justice Court. The matters arose simultaneously.

In the light of a factual situation such as the one at bar, the simultaneous assertion of all forms of relief claimed to be due appellant, and the simultaneous assertion of all causes of action claimed by appellant

(if multiple causes of action there be) should be mandatory. At least such is the view of the *Hennepin* case, *supra*; and any policy to the contrary flagrantly violates the established, basic policy of such of the Federal Rules of Civil Procedure as are concerned with settling all issues present in a particular matter at one time.

As previously stated, if the claims of appellant arose by way of counterclaim and not complaint, joinder would be compulsory under pain of waiver (Rule 13 (a) *F.R.C.P.*).

Speaking of Rule 18, Barron and Holtzoff say:

“... Thus where the parties are the same, there is no restriction whatsoever. . . . Consequently there is no excuse for the piecemeal litigation of a claim and all grounds on which a claim for relief is based must be asserted and concluded in one action. . . .”

2 *Barron & Holtzoff's Federal Practice Procedure* 41-42.

“As to the joinder of causes of actions, the new rules introduce what might be said to be novel principle. They proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleading, but only from trying two or more matters together which have little or nothing in common. They therefore permit the joinder of practically anything, and the court is allowed in its discretion to make an order for the separate trial of any matters which can be more conveniently tried that way. This, of course, eliminates a great deal of dis-

cussion and argument over technical points respecting joinder.

“Where the parties are the same, there is no restriction whatsoever. . . .”

45 W.Va. L.Q. 5;

Commentary following Rule 18 at Title 28
U.S.C.A. p. 29.

Where the claims are against the same defendant, misjoinder is impossible in a civil action (*Atl. Lumber Corp. v. So. Pac. Co.*, 2 F.R.D. 313 at 314).

Federal Rule of Civil Procedure 18 seeks to avoid multiple litigation (*Rank v. Krug*, 142 F. Sup. 1). The reason for the rule is obvious. It seeks to wipe the slate clean between a single plaintiff and a single defendant as expediently as possible. It seeks to avoid the continuous vexation in court of one defendant by one plaintiff.

The case of *White v. Sinclair Prairie Oil Co.*, 139 Fed. 2d 103, was an action brought by one Mary to obtain royalties. Mary had previously lost title to the land on a mortgage foreclosure; and it subsequently passed to the lessors, the present owners, who leased the land to the oil company. The oil company made a contract with Mary whereby it gave her \$8,000, in return for which Mary ratified the lease held by the lessee oil company and agreed to consider this lease valid irrespective of the actual title to the land (Mary being in a dispute with the lessor as to the title to the land). The agreement further provided that Mary waived all of her claims against the oil

company except as to royalties to be paid. Mary brought a suit against the lessor seeking possession and title to the land and lost. Subsequently, suit was brought by the United States on behalf of Mary, an Indian, against the lessor and the lessee oil company in which title to the land was sought together with royalties to Mary on the grounds that she was the true owner of the land. Again Mary lost. The present case involved a suit by Mary against the lessee oil company for royalties based on the \$8,000 agreement, Mary contending that the agreement obligated the oil company to pay her royalties over and above what the oil company might have to pay the lessor owner.

Again Mary lost.

The court held that Mary's right to royalties was decided in the suit brought on her behalf in which both title and royalties were sought and that, thereafter, Mary could not base the same claim on some basis other than ownership, such as the \$8,000 agreement with the oil company. The ruling of the court was to the effect that the suit brought on Mary's behalf for title and royalties was *res judicata* as to her royalty rights, by virtue of title, the \$8,000 agreement or otherwise.

The court condemned Mary's course of litigation as "piecemeal litigation".

Certainly, the course of litigation followed by appellant, namely: Into the Justice Court and out of it to the District Court in A-13,001; attempting expansion by amendment in A-13,001; out of the District Court on the question of amendment and into the same court

seeking the same expansion in A-13,503; and appeal to this court; and the apparent intention to bring still another suit to enforce the contract "as reformed" in the event reformation is granted; is a classic example of the "piecemeal litigation" which the Federal Rules, Barron & Holtzoff, the *White* case, and innumerable cases concerned with *res judicata*, the avoidance of circuitous litigation, and the condemnation of multiplicity of suits seek to avoid.

Where, under the liberal provisions of the Federal Rules of Civil Procedure, appellant could have sought all relief claimed at one time and did not, this court should limit appellant to the proceeding in A-13,001, bar appellant from further vexing appellee, adopt the logic and good policy of the *Hennepin* case, and affirm the judgment appealed.

**IS APPELLANT BARRED FROM MAINTAINING A-13,503 BY
VIRTUE OF THE DOCTRINE OF RES JUDICATA?**

The reasoning of the *Hennepin* case leads us logically to consideration of the doctrine of *res judicata*.

The *Hennepin* case holds, and such is logical and reasonable and wholly in keeping with the general policy of the Federal Rules of Civil Procedure, that:

"Not only under the Federal Rules of Civil Procedure, but under the law of Indiana, the plaintiff could have, in the first action, sought a reformation of the contract, *and it was its duty to have done so if it desired to litigate that question. . . .*"
(Emphasis ours.)

153 Fed. 2d at 827.

The law is established that the doctrine of *res judicata* operates as a bar not only as to what was litigated but as to what could have been litigated (innumerable cases in Volume 18-6 *Decennial Digest*, 1207, *et seq.*, Key No.: Judgments 713 (2); *First Nat'l Bank in Wichita v. Luther*, *supra* at 265).

In view of the liberal provision of the Federal Rules of Civil Procedure and in furtherance of the policy against continuous vexing through litigation, appellee submits that the principle of *res judicata* should not be limited to matters that can be raised only in the particular court in which the initial remedy is sought, in this case the Justice Court; but that the principle of *res judicata* should extend to whatever courts were available to appellant at the time litigation was initiated. In other words, initially, appellant could have sought all three remedies claimed in the District Court. All three could have been there litigated at the same time. Appellant chose, instead, to seek a single remedy in the Justice Court. *Res judicata* should operate as a bar to reformation and declaratory judgment in A-13,503; because these are matters which, although admittedly not litigated in the Justice Court, could have been litigated at the same time the action in the Justice Court was initiated, had appellant seen fit to bring its action in the District Court.

The application of *res judicata* in accordance with the aforestated principle would bar appellant's claim to both reformation and declaratory judgment.

If this court sees fit, however, to limit the doctrine of *res judicata*, to matters actually adjudicated, appellee does not contend, under this limited application of the doctrine, that the declaratory judgment relief would be barred; but appellee does contend that, even under this limited application of the doctrine, the relief of reformation would be barred.

Appellant seems to think the remedy of a declaratory judgment might very well be *res judicata* and involve a re-determination of the meaning of the word "property".

"Appellant in this latter complaint also asks for declaratory judgment. It is true that this could involve a redetermination of the meaning of words as used by the parties in the contract." (Appellant's Brief, p. 14.)

Although favorable to appellee, appellant cannot agree. Appellee believes that both the reformation and the declaratory judgment remedies are barred under the wide application of the *res judicata* doctrine above stated. Under the more narrow application of the doctrine, however, appellant feels that only the reformation remedy is within the doctrine.

Appellant admits that the sole question before the Justice Court was a definition of the word "property".

"The judgment then rendered by the Justice in the Justice Court (TR p. 17) ruled that appellant was not entitled to relief, and thus, decided that the word property, contained in the agreement (TR p. 6) meant only real property and that therefore the Appellant was not entitled to the

amount sued for which would have been due had the word property meant real and personal property.” (Appellant’s Brief, page 11.)

Appellant thus agrees that the meaning of the word property has been adjudicated; however, in keeping with his policy of vexing appellee with litigation, appellant, although it chose the Justice Court, is seeking a re-adjudication on appeal in A-13,001.

Appellant is seeking a still further adjudication of the same question in its request for reformation in A-13,503. This is true irrespective of what appellant says in its brief.

“In examining the complaint in Cause No. A-13,503 (TR p. 27) as to the thing sued for, or the prayer for relief in that complaint, (TR p. 31) here Appellant asks that the court reform the instrument according to the intent of the parties, further, that the Court declare certain rights and duties under the contract entered into by the party, but no allegation is made that the Court declare that the word property, as used in the contract, mean real and personal property as the Justice Court in the first case already decided that as used in the contract it meant only personal property . . .” (Appellant’s Brief, page 13.)

This statement is inaccurate, and it is believed that appellant means, in the last part of the last quotation, that the Justice Court decided that the word “property” meant real property instead of, as stated, “personal property”.

Appellant’s contention in the above quote, that his reformation prayer in A-13,503 merely seeks the refor-

mation of the instrument according to the intent of the parties and does not seek a declaration that the word "property" means real and personal property is plainly misleading. Of course, appellant is asking that the contract be reformed to spell out real and personal property. Why else would appellant want the contract reformed? Certainly appellant does not want the contract reformed so as to define property unequivocally as being real property. Appellant's desires in asking, in A-13,503, that there be a reformation of the instrument in accordance with the intent of the parties, were made obvious by the stipulation of April 22, 1958, filed herein subsequent to the printing of the transcript of record, but, by stipulation, made a part of the record, wherein appellant states its contention as to the true intent of the parties, namely, that the word "property" means real and personal property.

Appellant strongly contends that the reformation sought is identical to the matters adjudicated by the Justice Court and now pending in A-13,001.

In the light of the foregoing, let us examine the four essentials to *res judicata* as propounded by appellant (Appellant's Brief, page 12), quoting Mr. Justice Holmes in *Hyman v. Regenstein*, 222 Fed. 2d 545 at 549.

Appellant admits that items three and four of Mr. Holmes' requirements have been met, namely, identity of persons and parties to the action, and identity of the quality in the persons for or against whom the claim is made.

Appellant contends that point number two, identity of the cause of action, has not been met. There is but one cause of action here. Appellant is confusing multiple remedies arising out of a single cause of action with multiple causes of action.

So far as requirement number one, identity of the thing sued for, is concerned, appellee submits that the thing sued for in reformation is the identical thing decided by the justice, namely, a definition of the word "property" with the aim of collecting money under the contract. Indeed, with respect to this entire transaction, and there is but a single transaction and a single cause of action, appellant has stipulated that "the sole question to be decided herein is whether or not the word 'property' as used in said contract means real property or whether it means real and personal property." (Appellant's Brief, pages 10-11.)

SUMMARY.

Appellee contends:

1. A judgment should be affirmed although the reason for its entry, as stated, is erroneous.
2. The judgment below should be affirmed as a matter of policy favoring the expeditious determination of litigation.
3. The pendency of A-13,001 bars appellant from the reformation relief sought in A-13,503.
4. Appellant is estopped from maintaining A-13,503.

5. Appellant has waived its right to maintain A-13,503.

6. We are concerned with but a single cause of action and multiple remedies.

7. The doctrine of election of remedies bars appellant from maintaining A-13,503.

8. The Federal Rules of Civil Procedure prohibit the maintaining of A-13,503.

9. *Res judicata* prohibits the maintaining of A-13,503.

Only an affirmance of the judgment below will support the policy of the Federal Rules of Civil Procedure and the many doctrines directed to the prohibition of unjustifiable, vexatious litigation.

The judgment below should be affirmed.

Dated, Anchorage, Alaska,

April 28, 1958.

Respectfully submitted,

BUTCHER & DUNN,

By JOHN C. DUNN,

Attorneys for Appellee.

No. 15790

United States
Court of Appeals
for the Ninth Circuit

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

WARD C. HOY, District Director
Immigration and Naturalization
Service, Los Angeles, California

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

FEB 25 1958

PAUL P. O'BRIEN, CLERK

No. 15790

United States
Court of Appeals
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HALLDORA KRISTIN SIGURDSON,
Appellant,
vs.
ALBERT DEL GUERCIO, etc.,
Appellee.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Southern District
of California, Central Division

No. 18089-WM

HALLDORA KRISTIN SIGURDSON,

Plaintiff,

vs.

ALBERT DEL GUERCIO, JOHN DOE and
RICHARD ROE,

Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION

Comes now the plaintiff Halldora Kristin Sigurdson and for cause of action against the defendants, and each of them, complains and alleges:

I.

That she now is and for more than ten (10) years last past has been a resident of the County of Los Angeles, State of California, being in the jurisdiction of the above-described Court.

II.

That this Court has jurisdiction of the above-described action for a Declaratory Judgment by virtue of 5 U.S.C. 1009, the provisions of the Act of June 14, 1934, as amended, commonly known as the Declaratory Judgments Act (Title 28, United States Code, Section 2201, et seq.).

III.

That the defendant Albert Del Guercio is the duly appointed Officer in Charge of the Los Angeles office of the Immigration and [2*] Naturalization Service of the United States and is under the supervision and direction of the Attorney General of the United States and the Commissioner of Immigration and Naturalization, as well as the District Director for this district, said District Director having headquarters in San Francisco, California; that said defendant Albert Del Guercio, as Officer in charge of the Los Angeles office, is charged with the administration and execution within said area of the above District of the Immigration and Naturalization Service orders and the immigration laws of the United States.

That plaintiff is informed and believes that defendants John Doe and Richard Roe are Acting Officers in Charge of the Los Angeles office of above-described agency with the same rights, duty and responsibility as the Officer in charge, as alleged, and that plaintiff so alleged upon her information and belief.

IV.

That plaintiff does not know the true name or names of the defendants sued herein under the fictitious names of John Doe and Richard Roe and asks leave of this Court to amend showing the true name when same shall be duly ascertained.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

V.

That on or about the 30th day of March, 1953, the then District Director of this area for the above-described service, H. R. Landon, as District Director of the Immigration and Naturalization Service, issued or caused to be issued an Order of Deportation directing that the plaintiff be taken into custody and deported from the United States to Canada. Plaintiff is informed and believes and upon said ground avers that said Order of Deportation has never since been cancelled or vacated.

VI.

Plaintiff alleges that all administrative remedies have been exhausted. [3]

VII.

That plaintiff filed a petition for writ of Habeas Corpus in this Court on June 24, 1953, and said petition was denied on July 28, 1953. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court on September 7, 1954, and the United States Supreme Court denied writ of certiorari on January 10, 1955.

VIII.

Plaintiff contends that by virtue of said Order of Deportation she is about to be taken into custody for deportation and deprived of her liberty unlawfully, in violation of due process and the Fifth Amendment to the Constitution of the United

States, for reasons as hereinafter more fully set forth.

IX

That on or about the 29th day of December, 1946, plaintiff entered the United States at Blaine, Washington, for permanent residence after full and complete compliance with the appertaining law; that she had been a resident since March, 1944, and permanent residence admission secured thereafter as alleged. That at all times since said December 29, 1946, plaintiff has been, and still is, a lawful permanent resident of the United States.

X.

That plaintiff attended the University of Southern California at Los Angeles, from 1944 to 1950, attaining the collegiate degrees of A.B. and A.M. That the degree of A.B. was secured in 1948, A.M. in 1950. That she was a regular student for the bachelor's degree, while the master's degree was secured after obtaining employment as a teacher. That in July, 1949, plaintiff took a two-week vacation trip to Mexico and the last entry at San Ysidro, California, was the basis of the charge upon which the warrant of deportation was [4] based.

XI.

That plaintiff filed her "Preliminary Form for Naturalization and Certificate of Arrival" early in the year 1951, and she has been awaiting processing of same since said date of filing.

XII.

That during October, 1950, in response to a request for information from said service, plaintiff, was asked to report to said office at 1 p.m. on November 2, 1950. That she reported as requested and was interrogated by two investigators who were supposed to but did not record the interview, recording on a Dictaphone machine only what they desired and/or commanded plaintiff to state. That plaintiff is informed and believes and upon said ground alleges that eight Dictaphone belts were required to record as much as the investigators felt inclined.

XIII.

That the said investigators of said service presented alleged transcripts of said interview of November 2, 1950, for signature to plaintiff and she refused to sign same on the grounds that they, and each of them, were inaccurate, incomplete and not made freely and voluntarily.

XIV

That on or about the 11th day of October, 1951, plaintiff was served with a warrant of arrest for deportation upon the grounds that she had been a member of the Communist Party of the United States prior to her entry in 1949; that while she was a student at the university, it was claimed that she was a member of a club which was the campus cell of the Communist organization.

XV.

That said warrant, plaintiff is informed and believes and upon said ground alleges, was based upon the illegal and unconstitutional examination of November 2, 1950, and the testimony of two professional witnesses, both of whom are perjurers. [5]

XVI.

That she was granted a "so-called" hearing by the immigration service and the alleged statement of the November 2, 1950, interrogation was admitted into evidence over proper and valid legal objections and proof of its inadmissibility and proof that it was based upon spurious Dictaphone belts; that the hearing officer denied plaintiff the right to have the Dictaphone belts examined by Dictaphone Corporation experts to prove their spuriousness; that the hearing officer denied plaintiff right of reasonable cross-examination of a Government witness whom plaintiff subsequently proved a perjurer by documentary evidence; and, the hearing officer failed, neglected and refused to comply with the law set forth in 8 Code of Federal Regulations appertaining to conduct of deportation hearing.

XVII.

That the habeas corpus proceeding was a denial of due process of law in that the immigration service failed to and refused to file with the Court a full and complete immigration file and the documents required under the Order to Show Cause issued at the time of filing of the petition for writ of habeas corpus.

XVIII.

That the Immigration and Naturalization Service, by and through its then local District Director, H. R. Landon, has issued an Order of Deportation predicated upon the alleged statement of November 2, 1950, and the testimony of the two "alleged" witnesses and the decision of the hearing officer, all as hereinabove alleged, against the plaintiff on the ground that she had, prior to her re-entry, been a member of the Communist Party of the United States and by reason of the foregoing there is an actual controversy existing between the parties hereto with respect to the validity of said Order of Deportation and with respect to the enforcement thereof against the plaintiff by the defendants and/or defendant. [6]

XIX.

Plaintiff is informed and believes and upon the basis of said information and belief alleges that unless restrained by the Order of this Honorable Court, the defendant Albert Del Guercio, and/or defendants John Doe and Richard Roe, by and through his/their agents and employees intends to and will take plaintiff into custody under color of said Order of Deportation and will deprive her of her liberty and of the opportunity to earn her livelihood, to her irreparable damage, and will continue to act without authorization in law and threatens to and will deprive plaintiff of her liberty without recourse.

XX.

Plaintiff seeks (1) a Declaratory Judgment that the Order for the deportation of plaintiff issued, as aforesaid, on the 30th day of March, 1953, is void and without force or effect and, (2) an injunction restraining defendants, or any of them, from proceeding against the plaintiff under said Order, pending the determination of the validity of said order.

Plaintiff is without a plain, speedy or adequate remedy at law to prevent or redress such irreparable damage and injury as will result from her summary removal from the United States.

Whereupon, Plaintiff Prays Judgment as Follows:

1. That the Order of Deportation issued by the immigration service be declared illegal and void and without force or effect;
2. That an order be issued permanently enjoining and restraining defendants, or any of them, from deporting plaintiff;
3. Such other and further relief as is proper.

/s/ JOHN P. TOBIN,
Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 18, 1955. [7]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

To Albert Del Guercio, Officer in Charge of the Los Angeles office of the United States Immigration and Naturalization Service and John Doe and Richard Roe, Acting Officer/Officers of said office for said agency of the Government:

Upon reading the verified complaint on file herein and good cause appearing therefore,

It Is Hereby Ordered That You be and appear in Courtroom No. 2 of the above-entitled Court on the 25th day of April, 1955, at the hour of 10 a.m., to show cause, if any you have, why the plaintiff, Halldora Kristin Sigurdson, should not receive the relief prayed for in the complaint on file herein, and,

It Is Further Ordered that pending the hearing of said Order to Show Cause the defendants, and each of them, be and is restrained and enjoined from deporting said plaintiff.

Dated April 18, 1955.

/s/ WILLIAM C. MATHES,
Judge.

[Endorsed]: Filed April 18, 1955. [9]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Comes now the defendant, Albert Del Guercio, District Director of the Immigration and Naturalization Service at Los Angeles, California, and in answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Neither admits nor denies the allegations contained in paragraph II of plaintiff's complaint, the same being conclusions of law; alleges that if there is jurisdiction in a Declaratory Judgment Act to review the final order of the Immigration and Naturalization Service as to deportation of plaintiff, it is by [11] virtue of the provisions of the Administrative Procedures Act, 5 U.S.C. 1009 et seq.; it appears from paragraph XX of the complaint and the prayer thereof, that plaintiff seeks a judicial review of the final order of deportation. as distinguished from a trial de novo.

III.

Referring to the allegations contained in paragraph III of plaintiff's complaint, admits that the defendant, Albert Del Guercio, is presently the District Director of the Los Angeles District of the Im-

migration and Naturalization Service and is under the jurisdiction of the Commissioner of Immigration and Naturalization and the Attorney General of the United States and is charged with the administration and execution within the Los Angeles area of the above Immigration and Naturalization orders and the immigration laws of the United States. Denies each and every other allegation in said paragraph III contained, and alleges that the fictitious defendants John Doe and Richard Roe are improper and unnecessary parties to the action and should be dismissed therefrom.

IV.

Denies the allegations contained in paragraph IV with regard to the fictitious defendants and alleges that same are improper and unnecessary parties, that the allegation is immaterial and should be stricken, and that said parties should be stricken from the action.

V.

Admits the allegations contained in paragraphs V, VI and VII of plaintiff's complaint, and alleges that the previous action for petition for writ of habeas corpus was entitled In the Matter of the Petition of Halldora Kristin Sigurdson, No. 15648-C, in this Court, and that a copy of the Findings of Fact and Conclusions of Law and a copy of the Judgment which was filed, docketed and [12] entered July 28, 1953, in a habeas corpus proceeding, and affirmed on appeal by the Court of Appeals for the Ninth Circuit in Appeal No. 13974, are at-

tached hereto and made a part hereof, marked Exhibit A and Exhibit B, respectively.

VI.

Referring to the allegations contained in paragraphs VIII and IX, denies said allegations except admits that on or about December 29, 1946, the plaintiff entered the United States at Blaine, Washington, for permanent residence.

VII.

Referring to the allegations contained in paragraph X of plaintiff's complaint, denies said allegations and alleges that most of said allegations are immaterial and should be stricken, except admits that on or about July, 1949, plaintiff entered the United States at San Ysidro, California, and that said entry was the entry upon which the charges contained in a warrant of arrest dated October 11, 1951, were based.

VIII.

Admits the allegations contained in paragraph XI of plaintiff's complaint, but alleges that same are immaterial and should be stricken.

IX.

Denies the allegations contained in paragraphs XII, XIII, XIV, XV and XVI of plaintiff's complaint, and admits and alleges that on or about November 2, 1950, plaintiff was interrogated by two investigators of the Immigration and Naturalization Service and that the questions and answers during said interrogation were recorded on Dicta-

phone belts and that said Dictaphone belts were transcribed and the plaintiff did refuse to sign said transcription. Admits that a warrant of arrest dated October 11, 1951, was issued and served on plaintiff, and that said warrant of arrest required [13] that a hearing to enable plaintiff to show cause why she should not be deported in conformity with law should be held, and gave notice to said plaintiff that grounds upon which it was alleged she should be deported were under the Act of October 16, 1918, as amended, in that plaintiff had been, prior to entry, a member of the following class set forth in Section 1 of said Act; an alien who was a member of the Communist Party of the United States. A copy of said warrant of arrest is attached hereto, marked Exhibit C. Admits that on or about October 24, 1951, a hearing based on said warrant of arrest was held by Hearing Officer Bert F. Kearney at which plaintiff was present and represented by her counsel John P. Tobin, that a certified copy of said Immigration and Naturalization proceeding is in evidence as "Exhibit B" in the said above-referred-to habeas corpus action, No. 15648-C, and this Court will be asked to transfer all the records, files, pleadings, proceedings, exhibits and transcripts of record in said matter, including said Immigration and Naturalization File, to the instant action, in conformity with the opinion of the United States Court of Appeals for the Ninth Circuit in Action No. 14786 on appeal, said opinion being dated November 12, 1956.

X.

Denies the allegations contained in paragraphs XVII, XVIII and XIX of plaintiff's complaint except admits that an order of deportation as to the plaintiff was issued by said Immigration and Naturalization Service on or about March 30, 1953, and that said order was affirmed by the Board of Immigration Appeals and became a final deportation order on or about June 12, 1953. Alleges that it appears from the allegations contained in paragraph XVII, and on the face of the present complaint, that there has been a prior habeas corpus proceeding in which the order of deportation was reviewed by this Court in Action No. 15648-C and that said action [14] was affirmed by the Court of Appeals for the Ninth Circuit in Appeal No. 13974, and it is impossible to determine from the allegations in paragraph XVII of the complaint whether or not plaintiff claims that in said prior habeas corpus action a decision of the District Court, as affirmed by the Court of Appeals for the Ninth Circuit, was a denial of due process, but if so it would appear to be a contempt of the Court of Appeals decision in said prior Action No. 13974 on appeal.

XI.

Neither admits nor denies the allegations contained in paragraph XX of plaintiff's complaint, the same appearing to be in the nature of a prayer for review of a deportation order and an injunction; alleges that there is no need for a restraining order or injunction, as this Court well knows no attempt

to deport plaintiff will be made during the pendency of any court proceeding.

For a Further, Second, Separate and Affirmative Defense, Defendant Alleges:

I.

That the fictitious defendants, John Doe and Richard Roe, are improper and unnecessary party defendants and should be dismissed from the action.

For a Further, Third, Separate and Affirmative Defense, Defendant Alleges:

I.

That this Court has previously reviewed the order of deportation as to the plaintiff, which became final on or about June 12, 1953, in a habeas corpus action, No. 15648-C, and that the decision that said order of deportation was valid is *res judicata* in the present proceeding and this action should therefore be dismissed. [15]

For a Further, Fourth, Separate and Affirmative Defense, Defendant Alleges:

I.

That the complaint fails to state a claim upon which relief can be granted.

For a Fifth, Separate and Affirmative Defense, Defendant Alleges:

I.

That the Court lacks jurisdiction of any action for a trial *de novo*, as distinguished from review of

said final deportation order, as to the issue of plaintiff's deportability as an alien who, prior to entry, was a Communist.

Wherefore, plaintiff prays that this Court enter a judgment dismissing plaintiff's complaint on the grounds that the issues raised therein are *res judicata* because the same have previously been presented and tried in a petition for writ of habeas corpus in this Court on behalf of Halldora Kristin Sigurdson in Action No. 15648-C; or in the alternative, that this Court review said final deportation order and hold the same valid and effective, and determine that the plaintiff is deportable pursuant to said final order of deportation; for costs of suit herein, and for such other and further relief as to the Court seems just.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney,
Chief of Civil Division;

ARLINE MARTIN,
Assistant United States Attorney;

/s/ ARLINE MARTIN,
Attorneys for Defendant Albert Del Guercio. [16]

EXHIBIT A

In the United States District Court in and for the
Southern District of California, Central Division

No. 15648-C

In the Matter of the Petition of:

HALLDORA KRISTIN SIGURDSON, for Writ
of Habeas Corpus.

HALLDORA KRISTIN SIGURDSON,

Petitioner,

vs.

H. R. LANDON, ALBERT DEL GUERCIO,
HENRY GRATTAN, and DOE ONE to DOE
FIVE, Inclusive,

Respondents.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled matter came on regularly for hearing on an order to show cause why a writ of habeas corpus should not issue on July 13, 14, and 15, 1953, in the above-entitled Court before the Honorable Dave W. Ling, the petitioner being present in court on July 13, 1953, and being represented by her attorney John P. Tobin, and the respondents by its attorneys Walter S. Binns, United States Attorney, Clyde C. Downing and Walter M. Lehman, Assist-

ant United States Attorneys, appearing by Walter M. Lehman, [17] and the Court, having considered the pleading and oral and documentary evidence adduced, and having heard arguments of counsel, and having been submitted the complete administrative file of the Immigration and Naturalization Service containing the transcript of the administrative hearing of the petitioner and the exhibits introduced therein, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That on or about March 30, 1953, by authority of the Attorney General, a warrant of deportation directing the deportation of Petitioner Halldora Kristin Sigurdson was issued.

II.

That the issuance of said warrant was based upon deportation proceedings, in which hearing was given the alien petitioner commencing on October 24, 1951, and continuing thereafter until concluded.

III.

That the warrant of deportation issued March 30, 1953, by authority of the Attorney General, directs that the alien be deported on the ground that she has been, prior to entry, a member of the Communist

Party of the United States, and therefore, deportable under the Act of October 16, 1918, as amended.

IV.

That the Immigration and Naturalization Service that conducted said hearing had jurisdiction to act.

V.

That the petitioner had notice of the hearing, produced witnesses in her own behalf, and had opportunity to show that she did not come within the classification of aliens whose deportation Congress has directed. [18]

VI.

That there were no procedural irregularities at said hearing.

VII.

That said administrative hearing was fair.

VIII.

That there was substantial evidence to support the warrant of deportation.

Conclusions of Law

I.

That the petitioner is deportable under the Act of October 16, 1918, as amended, and Section 19 of the Immigration Act of 1917, as amended, in that petitioner, after administrative hearing, was found to be an alien who had been, prior to entry, a mem-

ber of the Communist Party of the United States, and who by warrant of deportation issued March 30, 1953, by authority of the Attorney General, was ordered deported on said ground.

II.

That the Immigration and Naturalization Service that conducted the hearing of October 24, 1951, had jurisdiction to act, that the hearing was fair, that none of the constitutional rights were abridged or violated, and that there is substantial evidence to support the order of deportation.

III.

That the detention of the petitioner by H. R. Landon, District Director, Immigration and Naturalization Service, Department of Justice, Los Angeles, California, for purposes of deportation, is lawful and proper.

Dated this 28th day of July, 1953.

/s/ DAVE W. LING,
United States District Judge.

Lodged: July 22, 1953.

Filed: July 28, 1953. [19]

EXHIBIT B

In the United States District Court in and for the
Southern District of California, Central Di-
vision

No. 15648-C

In the Matter of the Petition of:

HALLDORA KRISTIN SIGURDSON, for Writ
of Habeas Corpus.

HALLDORA KRISTIN SIGURDSON,

Petitioner,

vs.

H. R. LANDON, ALBERT DEL GUERCIO,
HENRY GRATTAN, and DOE ONE to DOE
FIVE, Inclusive,

Respondents.

JUDGMENT

The above-entitled matter came on regularly for hearing on an order to show cause why a writ of habeas corpus should not issue on July 13, 14 and 15, 1953, in the above-entitled Court before the Honorable Dave W. Ling, the petitioner being present in court on July 13, 1953, and being represented by her Attorney John P. Tobin, and the respondents by its attorneys, Walter S. Binns, United States Attorney; Clyde C. Downing and Walter M. Lehman, Assistant United States Attorneys; appearing by Walter M. Lehman, [21] and the Court, having consid-

ered the pleadings and oral and documentary evidence adduced, and having heard arguments of counsel, and having been submitted the complete administrative file of the Immigration and Naturalization Service containing the transcript of the administrative hearing of the petitioner and the exhibits introduced therein, and being fully advised in the premises, and the Court having heretofore made and filed its Findings of Fact and Conclusions of Law, and having ordered that a judgment be entered in accordance therewith;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That the petition of Halldora Kristin Sigurdson for a writ of habeas corpus be, and the same is, hereby denied and the order to show cause be, and the same is, hereby discharged.

Dated this 28th day of July, 1953.

/s/ DAVE W. LING,

United States District Judge.

Approved as to form, pursuant to Local Rule 7(a), this day of July, 1953.

.....,

JOHN P. TOBIN,

Attorney for Petitioner.

Lodged: July 22, 1953.

Filed: July 28, 1953.

Docketed and entered July 28, 1953. [22]

EXHIBIT C

WARRANT FOR ARREST OF ALIEN

United States of America, Department
of Justice, Washington

No. A 7 759 254

To District Enforcement Officer, Los Angeles, California, or to Any Immigrant Inspector in the Service of the United States.

Whereas, from evidence submitted to me, it appears that the alien, Halldora Kristin Sigurdson, who entered this country at San Ysidro, California, on July, 1949, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of October 16, 1918, as amended, in that she has been, prior to entry, a member of following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant her a hearing to enable her to show why she should not be deported in conformity with law. The expenses [23] of detention, hereunder, if necessary,

are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1952."

The Alien May Be Released From Custody Pending Determination of Deportability Under Bond in the Amount of \$2,000.00 or on Conditional Parole If Satisfied That He Will Appear When Wanted and That He Will Conform to the Conditions of a Parole Agreement.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 10th day of October, 1951.

H. R. LANDON.

[On reverse side.]

Port of Los Angeles, California

Date: October 11, 1951

Warrant of Arrest of
Halldora Kristin Sigurdson

Served by me at Compton, California, on October 11, 1951, at 9:50 a.m. Alien was then informed as to cause of arrest, the conditions of release as provided therein, advised as to right of counsel and furnished with a copy of this warrant.

/s/ FRANCIS W. WROBLEWSKI,
Investigator.

Witness:

/s/ MILTON B. BELL,
Investigator.

Affidavit of Service by Mail acknowledged.

[Endorsed]: Filed February 12, 1957. [24]

[Title of District Court and Cause.]

NOTICE OF, AND MOTION FOR, ORDER OF
COURT TRANSFERRING TO THIS AC-
TION THE RECORD, FINDINGS, JUDG-
MENT AND PROCEEDINGS IN HABEAS
CORPUS ACTION IN THIS COURT, IN
THE MATTER OF HALLDORA KRISTIN
SIGURDSON, NO. 15648-C, AND FOR DIS-
MISSAL OF FICTITIOUS DEFENDANTS
JOHN DOE AND RICHARD ROE

Comes now the defendant, Albert Del Guercio,
and moves this Court as follows:

I.

Moves to dismiss from the action herein the ficti-
tious defendants, John Doe and Richard Roe, as im-
proper and unnecessary party defendants.

II.

Moves the Court for an order transferring to this
action and into the record of this Court all of the
matters in an action in this Court for a petition for
habeas corpus, In the Matter of Halldora Kristin

Sigurdson, being No. 15648-C, as follows: All of the pleadings, files and records, transcript of hearings of July 13, 14 and 15, 1953, before the Honorable Dave W. Ling, [26] Judge presiding, and all of respondent's exhibits, to wit:

Exhibit A and

Exhibit B, being certified transcripts of the Immigration and Naturalization Proceedings re deportation order.

Exhibit C, the dictaphone belts.

Exhibit D, copy of June 12, 1953, decision of the Board of Immigration Appeals.

This motion is based upon the records and files in the present action, upon the mandate of the Court of Appeals spread in this action on December 21, 1956, and upon the decision of the Court of Appeals for the Ninth Circuit, No. 14786, dated November 12, 1956, in which decision it was stated, at page 5 thereof, as follows:

“Since the dismissal was for lack of jurisdiction, and since the record, findings and judgment of the District Court in the previous habeas corpus proceedings are not presently before us, we do not reach the question of whether full consideration of the record of a hearing by the Immigration and Naturalization Service in a habeas corpus proceeding precludes subsequent review of the substantiality of the same evidence on a petition for declaratory judgment.

The majority of a panel of this Court has so held in effect.¹² Therefore, this Court reverses the judgment dismissing the complaint for want of jurisdiction and remands the cause for further proceedings.” [27]

Dated: February 12, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney, Chief of Civil
Division;

ARLINE MARTIN,
Assistant United States At-
torney;

.....
ARLINE MARTIN,
Attorneys for Defendant Al-
bert Del Guercio.

NOTICE OF MOTION

To Plaintiff, Halldora Kristin Sigurdson, and John
P. Tobin, Her Attorney:

You and Each of You Will Please Take Notice that defendant, Albert Del Guercio, will bring on for hearing the above motion in the above-entitled action before the Honorable William M. Byrne, District Judge, in the captioned court in the United

¹²Crain vs. Boyd, 9 Cir., No. 14633, August 4, 1956.

States District Courtroom of Judge Byrne, Second Floor, Federal Building, 312 North Spring Street, Los Angeles, California, on Monday, March 25, 1957, at 10 o'clock a.m. of that day, or as soon thereafter as counsel can be heard.

Dated: February 12, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney, Chief of Civil
Division;

ARLINE MARTIN,
Assistant United States At-
torney;

/s/ ARLINE MARTIN,
Attorneys for Defendant Al-
bert Del Guercio.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 12, 1957. [28]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF OBJECTIONS TO MOTION OF THE
DEFENDANT DEL GUERCIO

Motion to Dismiss Fictitious Defendants Premature

It is submitted that the proper time to dismiss
fictitious defendants is at the trial of the above-

described matter. The nature of the action is not against any individual as such, be it Del Guercio or any other occupant of the office he holds, but is directed in fact as against the Immigration and Naturalization Service. The law demands, and plaintiff follows it, that the action be directed as done. Plaintiff has the legal right to be protected with the fictitious names until trial. Del Guercio may be transferred or resign. It is submitted that this plaintiff has the legal right to then serve the successor of Del Guercio without depending upon an Order of substitution of said successor as defendant.

The authorities cited in *Sigurdson vs. Del Guercio*, 9th Cir. (Nov. 12, 1956), Fed. (2nd), in connection with the use of fictitious defendants are not in point with instant matter. The cases [30] therein cited refer to attempts to obtain federal jurisdiction under the diversity rule in personal injury matters. In one instant, the fictitious defendants were dismissed by the trial court just prior to the matter being given to jury; the other, trial court dismissed as fictitious defendants sua sponte.

Moreover, fictitious defendants, as such, were discussed in the *Sigurdson vs. Del Guercio*, supra, matter because of a motion heretofore filed by said defendant regarding indispensable parties. It is submitted that the question of who is an indispensable party is no longer pregnant. Nowhere in the aforesaid appeal or in the cases cited is there any reference to Tenure of Office by Del Guercio. Besides, as Judge Fee so lucidly states in the citations

in Sigurdson vs. Del Guercio, supra, the plaintiffs did not give any indication whom the fictitious defendants might be. We do in our complaint. We cannot give names but we refer to the job. To dismiss the fictitious defendants at this stage of the proceedings could conceivably injure the rights of plaintiff and possibly deny her the opportunity to prove conclusively her innocence of the charge filed against her by the Immigration and Naturalization Service.

Motion Transferring to This Action Certain Parts
of the Record in the Said Habeas Corpus Matter
Said motion is premature.

The proper time to introduce evidence is at the trial of a matter. Under the pretrial procedure followed by this Court, a stipulation is all that is needed to get the full and complete record of the immigration proceedings and the habeas corpus proceedings.

If defendant was so anxious to have same, he could have made it an exhibit in his answer and adopted it by reference. This Court takes judicial cognizance of the records of this court.

Crain vs. Boyd, 237 Fed. (2nd) 927 cited by defendant in his motion is to be distinguished from instant matter as ably set forth by Judge Fee in Sigurdson vs. Del Guercio, supra. Plaintiff has [31] contended before the Circuit Court (9) the same position as adopted by the opinion in chief in the

Crain vs. Boyd, supra, matter. The concurring opinion of Judge Stephens in the Sigurdson vs. Del Guercio states with definity that he feels that habeas corpus scope has not been expanded to that of declaratory relief and that he is writing an opinion on said point to be filed.

While plaintiff does not regard Crain vs. Boyd as binding upon her, its persuasive force may be lessened by the opinion of Judge Stephens when it is filed. It is possible that there may be a conflict of decision on the point between two panels of said Circuit Court.

Dated: February 18, 1957.

Respectfully submitted,

/s/ JOHN P. TOBIN,

Attorney for Plaintiff.

Affidavit of service by mail acknowledged.

[Endorsed]: Filed February 19, 1957. [32]

[Title of District Court and Cause.]

OBJECTIONS TO POINTS SET FORTH IN
MOTION OF DEFENDANT DEL GUERCIO

Defendant's Point I

That motion to dismiss defendants named in above numbered and described complaint under fictitious names is premature.

Defendant's Point II

The motion for an order "transferring to this action and into the record of this Court—" of the habeas corpus proceedings as set forth in said motion of defendant is premature, incomplete and an effort to withhold from the record the failure on the part of the respondent in the habeas corpus matter to comply with an Order made and issued by the above-described Court, said Order being in writing and later made orally in open court.

Dated: February 18, 1957.

/s/ JOHN P. TOBIN,
Attorney for Plaintiff.

Affidavit of Service by mail attached.

[Endorsed]: Filed February 19, 1957. [34]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MARCH 25, 1957

Present: Hon. Wm. M. Byrne, District Judge.
Counsel for Plaintiff: John P. Tobin.
Counsel for Defendant: Arline Martin.

Proceedings:

Hearing: on motion of defendant for order of court transferring to this action the record, findings, judgment and proceedings in Habeas Corpus action in this court, in the matter of Halldora Kris-

tin Sigurdson, No. 15648-C, and for dismissal of fictitious defendants John Doe and Richard Roe.

Attorney Martin argues motion on behalf of defendant. Attorney Tobin argues to court on behalf of plaintiff. Court will permit plaintiff to file amended complaint under Title 5, U.S.C., Section 1009, and complaint is amended by interlineation on stipulation of both parties.

It Is Ordered that both motions be granted and cause is set for trial at 9:45 a.m., May 14, 1957.

Counsel for plaintiff to file a complete memorandum prior to April 17, 1957, and government counsel to have to May 1, 1957, in which to reply. Attorney Arline Martin to prepare order.

JOHN A. CHILDRESS,
Clerk.

By /s/ C. A. SEITZ,
Deputy Clerk. [36]

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO TRANSFER
TO THIS ACTION THE RECORDS AND
ENTIRE PROCEEDINGS IN THE MAT-
TER OF HALLDORA KRISTIN SIGURD-
SON, No. 156483, AND DISMISSING FIC-
TITIOUS DEFENDANTS

The defendant's "Motion for Order of Court
Transferring to This Action the Record, Findings,

Judgment and Proceedings in Habeas Corpus Action in This Court, In the Matter of Halldora Kristin Sigurdson, No. 15648-C, and for Dismissal of Fictitious Defendants John Doe and Richard Roe'' having come on for hearing before the Honorable William M. Byrne, Judge presiding, the plaintiff appearing by her attorney of record, John P. Tobin, and defendants appearing by Laughlin E. Waters, United States Attorney; Richard A. Lavine and Arline Martin, Assistants United States Attorney, and the matter having been argued orally, and the plaintiff having filed a written memorandum of points and authorities in support of objections to said motion, and the Court being fully advised in the matter, [37]

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that there be transferred to this action and into the record of this Court all of the matters in the action entitled "In the Matter of Halldora Kristin Sigurdson," being No. 15648-C, as follows: All of the pleadings, files and records, transcript of hearings, including the hearing on Tuesday, June 30, 1953, and the hearings on July 13, 14 and 15, 1953, and all of the exhibits identified or in evidence;

It Is Further Ordered, Adjudged and Decreed that the fictitious defendants, John Doe and Richard Roe, be and the same are hereby dismissed from the action.

Dated: April 9, 1957.

/s/ WM. M. BYRNE,

United States District Judge.

Affidavit of Service by Mail acknowledged.

Lodged March 28, 1957.

[Endorsed]: Filed April 9, 1957.

Docketed and entered April 11, 1957. [38]

[Title of District Court and Cause.]

CIVIL SUBPOENA TO PRODUCE A
DOCUMENT OR OBJECT

To: Albert Del Guercio, or Officer in Charge of the
Los Angeles Office of the Immigration and
Naturalization Service.

You Are Hereby Commanded to appear in the
United States District Court for the Southern Dis-
trict of California, at Postoffice and Courthouse in
the city of Los Angeles, on the 14th day of May, 1957,
at 9:45 o'clock a.m. to testify on behalf of Plain-
tiff in the above-entitled action and bring with you

1. All Dictaphone belts used at preliminary
hearing of above plaintiff on Nov. 2, 1950. This
means whether submitted at hearing or withheld
from hearing on her deportation warrant.

2. All alleged original transcripts of alleged
statement made from Dictaphone belts em-

ployed at said Nov. 2, 1950, hearing of aforesaid; your specific attention is directed to alleged original transcripts (three [3] in number) presented to plaintiff in 1950 for her signature.

3. Statement under oath filed with I & N on Nov. 20, 1950, by pl. May 8, 1957.

JOHN A. CHILDRESS,
Clerk;

By E. THOMPSON,
Deputy Clerk.

JOHN P. TOBIN,
Attorney for Plaintiff. [40]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MAY 14, 1957

Present: Hon. Wm. M. Byrne, District Judge.

Counsel for Plaintiff: John P Tobin.

Counsel for Defendant: Arline Martin,
Assistant U. S. Attorney.

Proceedings: For Court trial.

Court convenes herein at 9:50 a.m., and counsel for both sides and plaintiff being present, Court orders trial proceed.

Gov't Ex. A is marked for ident. and admitted into evidence.

Albert Del Guercio, defendant, is called by plaintiff, and is sworn and testifies.

Plf's Ex. 1 and 2 are marked for ident. only.

Bert F. Kearney and Thomas J. Nolan, respectively, are called by plaintiff and are sworn and testify.

Attorney Tobin makes offer of proof as to testimony of the following witnesses heretofore subpoenaed: Philip F. Habell and Oral K. Chandler.

Gov't Ex. B is marked for ident. only.

Bert F. Kearney resumes the stand.

At 11:05 a.m. court recesses. At 11:15 a.m. court reconvenes herein, and all being present as before, trial proceeds.

Thomas J. Nolan, heretofore sworn, resumes the stand.

Attorney Tobin makes offer of proof as to testimony which would be given by Mr. Barnhill of the Dictaphone Co.

Oral Kenneth Chandler is called by plaintiff, and is sworn and testifies.

At 12:05 p.m. court recesses to 2 p.m. At 2:05 p.m. court reconvenes herein, and all being present as before, court orders trial proceed.

Philip F. Habell is called by plaintiff, and is sworn and testifies.

Halldora Kristin Sigurdson is called, sworn, and testifies in her own behalf.

Attorney Tobin makes offer of proof as to dictaphone belts handled by Mr. Habell and Mr. Chandler.

Plaintiff rests.

Gov't Ex. C is marked for ident. only.

The Court takes the matter under submission and orders counsel to file briefs, plaintiff to file opening

brief within fifteen days, defendant to file answering brief fifteen days thereafter, and plaintiff to file closing brief five days after filing of defendant's answering brief.

JOHN A. CHILDRESS,
Clerk;

By /s/ C. A. SEITZ,
Deputy Clerk.

WB-5/14/57. [41]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Sigurdson, a native and national of Canada, first came to the United States in 1944. In July, 1949, she took a vacation in Mexico. On October 10, 1951, a warrant was issued for her arrest for deportation, it being charged that prior to her re-entry, following the vacation in Mexico, she had been a member of, or affiliated with, the Communist Party of the United States, and hence that she was subject to deportation pursuant to the provisions of the Internal Security Act of 1950, Ch. 1024, 81st Cong., 2nd Session, 64 Stat. 987, 1006.

Administrative hearings upon the warrant were commenced October 24, 1951, and continued from time to time thereafter and concluded on February 20, 1952. At such hearings the plaintiff was present and represented by counsel. The hearing officer made findings and a decision that plaintiff was a volun-

tary member of the Communist Party of the United States for a period of time during the years 1946-1947, concluded that she was subject to deportation and recommended that she be ordered deported. His findings and decision were approved and adopted by the appropriate officer of the Immigration and Naturalization Service, and plaintiff's appeal [42] therefrom was dismissed by the Board of Immigration Appeals on March 19, 1953. A final warrant or order of deportation issued March 30, 1953.

Plaintiff filed a petition for a writ of habeas corpus seeking judicial review of the deportation proceedings. The District Court reviewed the administrative proceedings and dismissed the petition upon the merits. The Court of Appeals affirmed, *Sigurdson v. Landon*, 215 F. 2d 791 (CA 9). The Supreme Court denied certiorari, 348 U. S. 916; rehearing denied 348 U. S. 956.

In this action for declaratory relief the plaintiff seeks a second judicial review of the same administrative proceeding. Undaunted by the judgment of the District Court, the affirmance of the Court of Appeals and the denial of certiorari by the Supreme Court, she asks this Court to proclaim that those tribunals were in error.¹ [43]

¹The following colloquy took place at the hearing:
"The Court: * * * This is all matter that was in the habeas corpus proceeding, was it not?

"Mr. Tobin: Yes.

"The Court: And, as a matter of fact, the Court of Appeals went all through this, including the

The Ninth Circuit decision in *Leonard Cruz Sanchez v. Robinson*, . . . F. 2d . . . , decided June 15, 1957, is dispositive of this case. See also *Tora Upstead Rystad v. John P. Boyd*, . . . F. 2d . . . (CA 9), decided June 21, 1957. An alien may not have a redetermination of issues adjudicated in a previous judicial review. Judicial review of an administrative proceeding may be had either by habeas Corpus or an action for declaratory relief, *Shaughnessy v. Pedreiro*, 349 U. S. 48, 75 S. Ct. 591, 594, but Congress did not intend successive judicial reviews of the same administrative action with the resultant anomalous situation of having a District Court determine whether the prior decision of a Court of Appeals should be set aside as erroneous.

This Court granted a motion of the defendant "transferring to this Action, the Record, Findings, Judgment and Proceedings in Habeas Corpus Action, In the Matter of Halldora Kristin Sigurdson, No. 15648-C." The Court finds that the administrative proceedings which plaintiff asks this Court to review are the identical proceedings reviewed by the Court in Habeas Corpus action No. 15648-C, which judgment was affirmed by the Court of Appeals (215

clicks, and so forth, and discussed the question of the clicks. All this was presented to the Court of Appeals. Is that not true?

"Mr. Tobin: Yes. And they erred on the point.

"The Court: And you want me to overrule the Court of Appeals, is that correct? You want me to decide this differently than the Court of Appeals decided it, is that what you seek?

"Mr. Tobin: Yes, your Honor."

F. 2d 791) and concludes as a matter of law that said judgment precludes a second judicial review of the same administrative action.

The findings of fact and conclusions of law appearing in this Memorandum of Decision shall serve the purpose stated in Rule 52 Federal Rules of Civil Procedure. A formal judgment shall be entered accordingly.

Dated: July 26, 1957.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed July 26, 1957. [44]

United States District Court, Southern District
of California, Central Division

No. 18,089-WB

HALLDORA KRISTIN SIGURDSON,

Plaintiff,

vs.

ALBERT DEL GUERCIO,

Defendant.

JUDGMENT

The above cause having come on for trial on May 14, 1957, before the Honorable Wm. M. Byrne, plaintiff appearing by her attorney, John P. Tobin, and defendant appearing by Laughlin E. Waters,

United States Attorney, and Arline Martin, Assistant United States Attorney; and the certified transcript of the Immigration and Naturalization proceedings having been introduced in evidence as Exhibit A, and all of the record, findings, judgment and proceedings in habeas corpus action In the Matter of Halldora Kristin Sigurdson, No. 15648-C, being before the Court pursuant to its order, and the matter having been argued orally and upon written memoranda, and the Court having heretofore filed its memorandum of decision including findings of fact and conclusions of law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the relief prayed for by the plaintiff is denied with costs to the defendant in the sum of \$20 as and for a docket fee pursuant to 28 U. S. C. 1923.

Dated: July 26, 1957.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed and entered July 26, [45] 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Halldora Kristin Sigurdson, plaintiff in the above-described action, ap-

peals to the United States Court of Appeals for the Ninth Circuit from:

1. The Judgment made and signed on July 26, 1957, and the whole thereof.
2. Denial of relief prayed for in the complaint for declaratory relief and injunction.

Dated at Los Angeles this 21st day of August, 1957.

/s/ JOHN P. TOBIN,
Attorney for Plaintiff.

Affidavit of Service by Mail acknowledged.

[Endorsed]: Filed August 22, 1957. [46]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Briefly stated, the points of appeal are:

1. The administrative Order of Deportation constituted an abuse of discretion; contrary to law and regulations; and a denial of due process of law; and
2. The administrative deportation hearing of plaintiff was unfair; and
3. Judgment of trial court is contrary to law.

/s/ JOHN P. TOBIN,
Attorney for Plaintiff.

Affidavit of Service by Mail acknowledged.

[Endorsed]: Filed August 22, 1957. [49]

In the United States District Court, Southern
District of California, Central Division

No. 18,089-WB Civil

HALLDORA KRISTIN SIGURDSON,

Plaintiff,

vs.

ALBERT DEL GUERCIO,

Defendant.

Honorable William M. Byrne, Judge presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff:

JOHN P. TOBIN, ESQ.

For the Defendant:

LAUGHLIN E. WATERS,

United States Attorney; by

ARLINE MARTIN,

Assistant United States Attorney.

Tuesday, May 14, 1957—9:45 A.M.

The Court: Call the calendar.

The Clerk: No. 18,089-WB Civil Halldora Kristin Sigurdson vs. Albert Del Guercio, for court trial.

Miss Martin: Ready for the government.

Mr. Tobin: Ready for the plaintiff, your Honor.

The Court: You may proceed.

Perhaps, first, before you start, so there will be no question, as I understand it, the Complaint was amended, inserting the grounds of jurisdiction?

Mr. Tobin: Yes. That was done on March 25th, your Honor; and also the John Does stricken.

The Court: What is that?

Mr. Tobin: Also the John Does stricken.

The Court: Yes.

You may proceed.

Mr. Tobin: If the court please, I was told before your Honor came on the bench that Mr. Del Guercio, upon whom we served a subpoena duces tecum, had recently suffered a cardiac, and for that reason they asked us if we would put him on the stand first.

With the court's permission, I don't think it will be necessary to put him on the stand just to ask him if he brought the records, and at this time mark them for identification, [3*] because I wouldn't want to subject anybody to any strain.

Miss Martin: Mr. Del Guercio has consulted his doctor, and he is here in response to the subpoena and he is willing to be put on the stand, and we don't choose to go along with Mr. Tobin's suggestion.

If he wants to call him to the witness stand, that is fine. We want to have the record so that we can make our formal objections.

The Court: Is there any dispute as to the record? It is an unusual situation to bring in the Director.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Mr. Tobin: To get certain records that were under his care and control.

The Court: Ordinarily, counsel bring the records into court.

Mr. Tobin: These records have never been produced in court, your Honor, and I wanted them before your Honor so that your Honor would have the complete record before the court.

I might say this subpoena asks for: "All Dictaphone belts used at preliminary hearing of above plaintiff on November 2, 1950. This means whether submitted at hearing or withheld from hearing on her deportation warrant."

The Court: At any rate, we would perhaps save time if you put Mr. Del Guercio on the stand and asked him. All I am [4] stating is that ordinarily in this type of case counsel brings in the record.

Miss Martin: In that regard, your Honor, we have already an order bringing into this court the file in the previous habeas corpus proceeding, and I would like to suggest that we now mark as an exhibit in this case the immigration proceedings and make them identified in this case. They were Exhibit B in the previous habeas corpus action, and I think that it would be advisable for us to mark that file as an exhibit in this proceeding. Whether it should be plaintiff's or defendant's is immaterial, so I will ask the clerk to mark for identification a certified copy of the immigration file relating to the proceedings in the deportation of this plaintiff, which was identified as Exhibit B in the prior action No. 15648.

The Court: Very well. It will be received.

The Clerk: Government's Exhibit A.

Mr. Tobin: For identification?

The Court: It was offered in evidence. It will be received in evidence. You surely haven't any objection to that?

Mr. Tobin: Yes, I do, your Honor, on the ground that it is not complete, and for that reason I do object to it.

At this time I make the offer of proof that I will show that there are certain Dictaphone belts missing from this record. [5]

The Court: You will get a chance to make your offer of proof, but, Mr. Tobin, you come into this court seeking a judicial review, you ask this court to review the action of the administrative body; how can I review it unless the record is before me?

Mr. Tobin: That's right, your Honor. But in order that there may be fairness to the government and to the plaintiff, the only way that the court can intelligently and accurately review it is by having the complete record before it.

The Court: That is offered as the record. You are not questioning that that is not the record?

Mr. Tobin: I am questioning that that is the complete record. I am admitting that insofar as it goes it is the record.

The Court: I see. In other words, it is your position that there is something in addition to that?

Mr. Tobin: Yes, your Honor.

The Court: Very well. That of course would be

no ground for not admitting this, as long as it is even a part of the record.

It will be admitted.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit A.)

ALBERT DEL GUERCIO

called as a witness by the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Give us your full name.

The Witness: Albert Del Guercio.

Direct Examination

By Mr. Tobin:

Q. Mr. Del Guercio, did you bring the documents that were named in the subpoena duces tecum served upon you?

Miss Martin: I will object to the question, your Honor, as ambiguous, relating to all of the documents, and ask counsel if he will refer to the documents one by one so that we may make our proper objections for the record.

The Court: Sustained.

Q. (By Mr. Tobin): Mr. Del Guercio, did you bring with you all of the Dictaphone belts used at the preliminary hearing of Miss Sigurdson on November 2, 1950? And this means whether they were submitted at hearing or withheld from hearing.

A. No, I did not, for the reason that they are not in my possession.

(Testimony of Albert Del Guercio.)

Q. In whose possession are they?

A. In possession of the court. They were made, as I am told, a part of an exhibit in this case by an order of the [7] court dated April 9, 1957, and I was shown the record here just this morning, and I see that the belts relating to this date, November 2, 1950, are in that record. There are eight belts, five in one envelope and three in another.

Q. Yes. Are those eight belts that you say are in court the only Dictaphone belts that your office has of that November 2nd hearing?

A. I don't know that of my own knowledge, but I caused a search to be made of the record, and I was told that they are the only records of the November 2, 1950, hearing.

Q. How about the transcripts of the preliminary hearing of November 2, 1950, did you bring them with you?

A. I did not for the reason that I do not have them in my possession. I am told, however, that they are also a part of the Immigration record that was introduced in this case as a government's exhibit, and by order entered April 9, 1957.

Q. Mr. Del Guercio, I don't want to prolong this, but the government record that your office furnished in the original habeas corpus proceeding had one transcript, is that not true?

A. Yes, one original transcript.

Q. The transcript that was introduced at the hearing?

A. Yes, sir.

(Testimony of Albert Del Guercio.)

Q. Do you know about the other transcripts that were prepared from those belts prior thereto? [8]

A. No, I do not.

Q. Do you know whether there were any other transcripts prepared?

A. Not of my own knowledge, but I am told that there were, and I have brought with me, at the suggestion of Miss Martin, copies of transcripts of the hearings had on November 2, 1950.

Q. Do you have them in the court room?

A. Yes, sir.

Mr. Tobin: May I see them, Miss Martin?

Q. (By Mr. Tobin): Is this the same as the transcript that was introduced at the hearing as Exhibit 7, part of Exhibit B, now Exhibit A?

A. I have no personal knowledge of that.

Mr. Tobin: May we ask that this be marked for identification at this time, your Honor?

The Court: Yes.

The Clerk: Do you wish that as Plaintiff's Exhibit 1?

Mr. Tobin: As Plaintiff's No. 1.

Miss Martin: May we identify it in the record as a carbon copy with some ink notations on it of a hearing dated—of matter pertaining to the date of November 2, 1950?

The Clerk: Is this admitted, your Honor?

The Court: No. It is marked for identification.

Mr. Tobin: Marked for identification at this time. [9]

(Testimony of Albert Del Guercio.)

(The exhibit referred to was marked as Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Tobin): How about a statement that was filed with your office by Miss Sigurdson on November 20th; do you have that, Mr. Del Guercio?

A. Yes, I do.

Mr. Tobin: May I have that, please?

Miss Martin: We want to object, your Honor, to producing any statement bearing the date of—what was the date?

Mr. Tobin: November 20, 1950.

Miss Martin (Continuing): —November 20, 1950, as not a part of the record in this case, and not a part of any hearing. In other words, an improper part of the record. It is irrelevant and immaterial.

We do have the statement here, in response to the subpoena, but we want to object to producing it on the grounds that it is immaterial to the record.

Mr. Tobin: May I be heard?

The Court: No.

You produce it and mark it for identification. You make your objection at the time of it being offered in evidence, if it is offered in evidence.

The Clerk: Plaintiff's Exhibit 2 for identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 2 for [10] identification.)

(Testimony of Albert Del Guercio.)

Mr. Tobin: We have no further questions of Mr. Del Guercio, and I wish you a speedy recovery, Mr. Del Guercio. Miss Sigurdson joins me.

Miss Martin: We have no questions, Mr. Del Guercio.

The Court: You may step down. Thank you, Mr. Del Guercio.

The Witness: Thank you, sir.

Mr. Tobin: Mr. Kearney, will you please take the stand.

Miss Martin: May Mr. Del Guercio be excused, your Honor?

The Court: Yes, he may be excused.

BERT KEARNEY

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated and give us your full name, please.

The Witness: Bert F. Kearney.

Direct Examination

By Mr. Tobin:

Q. Mr. Kearney, what is your business, profession, or occupation?

A. I am an Immigration officer.

Q. Directing your attention to 1951, particularly the month of October, did you have occasion to preside at a deportation [11] hearing of the plaintiff herein, Halldora Sigurdson?

(Testimony of Bert Kearney.)

Miss Martin: I object to the question, your Honor, on the ground it is incompetent, irrelevant and immaterial; that this is a hearing for a review of a record, and this appears to be an attempt to go outside of the record, and any testimony of Mr. Kearney is not properly a part of this hearing.

The Court: What is the purpose?

Mr. Tobin: This is just a preliminary, your Honor. We are now going to show and establish that the decision of Mr. Kearney is an unfair decision, unwarranted by the facts adduced at the hearing, and we are also going to show through Mr. Kearney that the belts which are before this court, particularly those five belts, the other three have no pertinency and they are not the ones that were introduced, and I will prove that with Mr. Kearney, that they were spurious evidence, and that the decision of this hearing officer was a fraud, and that it did not conform to the facts, and it was misleading, and this hearing officer is guilty of misfeasance, malfeasance, and nonfeasance of office.

The Court: The objection is sustained.

Mr. Tobin: All right.

Q. Now, Mr. Kearney, how many times during the hearing did you take judicial notice that the Dictaphone belts would show a click when played at the hearing?

Miss Martin: I object on the same grounds, your Honor, [12] and on the additional ground that the Dictaphone belts themselves are the best evidence.

The Court: The objection is sustained.

(Testimony of Bert Kearney.)

Mr. Tobin: May I be heard, your Honor?

The Court: Counsel, let me say this to you. This is all matter that was in the habeas corpus proceeding, was it not?

Mr. Tobin: Yes.

The Court: And, as a matter of fact, the Court of Appeals went all through this, including the clicks and so forth, and discussed the question of the clicks. All this was presented to the Court of Appeals. Is that not true?

Mr. Tobin: Yes. And they erred on the point.

The Court: And you want me to overrule the Court of Appeals, is that correct? You want me to decide this differently than the Court of Appeals decided it, is that what you seek?

Mr. Tobin: Yes, your Honor.

The Court: I have no power to overrule the Court of Appeals. The Court of Appeals has ruled on this question, and I have no power to overrule them.

Mr. Tobin: May I respectfully submit that the decision of the Court of Appeals is upon a judgment that is void on its face; that the judgment in the habeas corpus action is based upon findings of substantial evidence, which is not in conformity with 242(b)4 or 8 USC 1254(a)4. And I respectfully [13] submit that under Marcello the judgment is void on its face.

The Court: Mr. Tobin, assuming that everything you say is correct, assuming that they made a mistake, that they were in error, and assuming that the

(Testimony of Bert Kearney.)

Supreme Court when they denied certiorari also made a mistake and should have granted certiorari in this case, I still do not have the power to reverse the Court of Appeals.

Mr. Tobin: But I am not asking the court to reverse——

The Court: You are. You just got through saying that you are.

Mr. Tobin: What I am saying is, I am asking the court to rule differently under the state of facts that I am going to present here. I submit that the doctrine of the law of the case doesn't apply here.

The Court: The objection is sustained.

Mr. Tobin: Very well.

Q. Mr. Kearney, did you hear that Dictaphone—those Dictaphone belts played?

Miss Martin: I object; incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Tobin): Mr. Kearney, how many Dictaphone belts were handed to you by Tom Nolan at the hearing of Miss Sigurdson? [14]

Miss Martin: Same objection.

The Court: The same ruling. And this entire line of questioning is included within the ruling.

Mr. Tobin: Yes, your Honor.

No further questions at this time, under the court's ruling.

The Court: You may step down.

The Witness: Thank you.

Miss Martin: May Mr. Kearney be excused, your Honor?

The Court: Yes, he may be excused.

Mr. Tobin: Call Mr. Nolan.

THOMAS J. NOLAN

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated and give us your full name, please.

The Witness: Thomas J. Nolan.

Mr. Tobin: May we identify the witness for the record, your Honor?

The Court: Yes, go ahead.

Direct Examination

By Mr. Tobin:

Q. Mr. Nolan, you are an Immigration officer, and during [15] the deportation hearing of Miss Sigurdson in 1951 and 1952 you were the examining officer?

A. Yes, to both of your questions, counsel.

Q. Mr. Nolan, during the course of that deportation hearing did you hand to Bert F. Kearney eight Dictaphone belts as the Dictaphone belts of the November 2nd hearing?

Miss Martin: I object on the ground it is incompetent, irrelevant and immaterial, and improper, not a part of the record of this proceeding. This is not a de novo hearing.

(Testimony of Thomas J. Nolan.)

Mr. Tobin: At this time, your Honor, I refer the court to page 107 of the transcript of the hearing, wherein it will show that this witness counted in open hearing——

The Court: Counsel, the objection is sustained. With the further statement that you can't try this case twice. Even if it wasn't part of the record. The only purpose of admitting the record here in this case is to show it is the same record. And, of course, it is your statement that it is the same. You have made the statement that it is the same record.

Mr. Tobin: Insofar as it goes, yes.

The Court: I have already stated to counsel we are bound by the judgment in the prior case.

Mr. Tobin: May I assume, then, for the purpose of the record, that any further questions addressed to the witness, Mr. Nolan, regarding his transferring to the hearing officer the belts, that we will have the same ruling? [16]

The Court: Yes.

Mr. Tobin: That's all.

The Court: Why don't you make an offer of proof?

You may step down.

Why don't you make an offer of proof, if you are going to call some more witnesses for this same purpose?

Mr. Tobin: Okay.

At this time, your Honor, were the witnesses, Mr. Chandler and Mr. Habell—at this time I make the offer of proof that these men were the two investi-

gating officers who conducted the preliminary hearing on November 2nd; that I make the offer of proof that at conferences on November 8th or 10th, and on the 14th, that Mr. Habell in the presence of Mr. Chandler presented to the plaintiff and her counsel three different transcripts of the preliminary hearing.

I further make the offer of proof that Mr. Chandler would testify that at the time of the first conference in their office with Miss Sigurdson and myself as her attorney, and these two men, that he would say that Mr. Habell played a short portion of the Dictaphone belt, and that that did not correspond with the transcript that they were asking us to sign without any interlineation, amendments, or corrections.

I further make the offer of proof that Mr. Habell will deny this.

I now add that the testimony of Mr. Habell and Mr. [17] Chandler grouped together will show that Miss Sigurdson was in this room where they had the hearing room, Room 227, at the office of the Immigration Service, from shortly after 1:00 o'clock until approximately a quarter to 5:00; that of this statement, which is Exhibit 7 of the original Exhibit B, now Exhibit A, that Mr. Habell asked the questions on the first approximately 10 pages, Mr. Chandler took over for a short while, not beyond page 13, and that Mr. Habell continued again until approximately page 29, and that Mr. Chandler took over and finished the statement up to page 38, with one additional page of verification.

I make the offer of proof that both these men would testify that it was an extremely hot day; that Mr. Habell would admit that all the windows were closed, that he closed them; that Chandler would deny this, saying that there was one window partly open; that both of them will deny having used psychological force or intimidation or pressure; that both of them will admit that the machine when stopped, and I am now referring to a Dictaphone machine of the type and operation of the style that was used in 1950, put out by the Dictaphone Corporation, would show a click each time that it was stopped; that both of these men would so testify.

Further, that I will show that these men were present in the hearing room, that they heard the Dictaphone played, and on the statement of the hearing officer Kearney, which does [18] not appear in the record, there was but one stop, and that was on page 17 of this statement, following the question—I don't recall the exact words, but it had to do with the John Reed Club, and there was a click there, and there was a possibility of another click. That was the statement of Mr. Kearney, the hearing officer. That does not appear on the record. And these men, I respectfully submit and offer to prove, would so testify.

I now ask that a ruling be made upon that type of testimony.

Miss Martin: As nearly as I can tell from the offer of proof, your Honor, we would object that all of it is incompetent, irrelevant and immaterial, as matter either already contained in the Immigration

record and gone into there, and a review of that file is the only thing before this court, and also as matter already covered in the previous habeas corpus trial and therefore res judicata by the decision of the Court of Appeals which fully covers it all.

We do not mean our objection to run here this morning to any question with regard to the completeness of the record. We make our objection on all those other grounds.

The Court: Objection sustained.

Mr. Tobin: Then insofar as the completeness of the record, may I ask that the witnesses be put on for that purpose, your Honor? [19]

The Court: In what sense, counsel? What do you mean completeness of the record?

Mr. Tobin: The completeness of the record is this, your Honor: That there were eight belts presented at the hearing by Mr. Nolan——

The Court: When you say "the hearing," are you referring now——

Mr. Tobin: To the Immigration hearing before Mr. Kearney. Mr. Nolan was not present at the preliminary hearing. When I refer to the hearing of November 2nd, I refer to that, if I may, as the preliminary hearing.

If the court please, it is our position that never to this day has there been presented to this court or to any court the eight Dictaphone belts that were presented by Mr. Nolan, the examining officer, to Mr. Kearney, and which he counted in the presence of everybody in that hearing, one by one. That at the time of the habeas corpus proceeding we secured an

order to show cause to produce all of the Dictaphone belts. That they came into court with five belts, and later when commanded to do so by Judge Carter of this court, three additional belts were included. And as I have pointed out in my trial memo, one of those belts was a belt taken of some statement made by me or while I was discussing this matter subsequent to the hearing.

Now, I respectfully submit, your Honor, any belt taken [20] subsequent to the hearing cannot be included within the eight belts which should be a part of that hearing.

I have given the book and page on that in my trial memo where that was the statement of the United States Attorney at that time. When we have a statement by the examining officer that there are eight belts and more belts used, I respectfully submit that the court is entitled, and it cannot make a hearing unless it has the original eight belts.

The Court: Now, let me straighten you out on this.

There are eight belts here——

Mr. Tobin: That's right.

The Court: Is it your contention that there are some belts in addition to the eight belts?

Mr. Tobin: It is my contention that the belts here are not the original belts, period. It is my contention that until we have the eight belts presented by Mr. Nolan to Mr. Kearney this court will not be able to give a fair decision.

The Court: I am going to give you an opportunity, if there are some belts—all I want to get

straightened out is if you contend that there are some additional belts, then of course I want those belts presented here. Not to be put into evidence, because there isn't anything going into evidence in this case that was not in evidence in the habeas corpus case. However, you may present them and have them marked for identification so you will have that record before the Court of Appeals. [21]

In other words, I want to give you an opportunity to have everything before the Court of Appeals. The only thing is that something that was not before the court in the previous action may not be before this court in determining this question, so it will be merely marked for identification.

In short, Mr. Tobin, in the first place this is a judicial review, and in a judicial review the court reviews the record, the selfsame record that was before the Immigration authorities, and determines the question on matters that were before the Immigration authorities.

In this particular case there has already been a judicial review on a habeas corpus proceeding, and the District Court there reviewed the Immigration proceeding and then the Court of Appeals reviewed the findings and judgment of the District Court, and the Supreme Court then reviewed that, or at least considered it, and denied certiorari. So I can't change that record that was in the habeas corpus proceeding, and as I have already indicated to you, the fact that you have had one judicial review bars a second judicial review. However, I realize, because you have just told me, that you contend that the

District Court and the Court of Appeals in the other proceeding committed error, and that you expect me to correct that error. I realize that that is your position, and you expect me to make a new record, so I do not want to deprive you of having a [22] complete record before the Court of Appeals on it, and therefore if you have additional records, you may have them marked for identification.

If you think there is a witness here that has additional records, you may call him, if that is what you have in mind, and ask him.

There are eight records here now.

Mr. Tobin: That's right.

The Court: And you spoke of eight.

Are all eight of these records—were they in evidence in the habeas corpus proceeding?

Mr. Tobin: I think the last three were marked for identification. I don't recall whether they were put into evidence. But in either event they were before the court.

Miss Martin: I would like to suggest at this time, your Honor, that the government would like to have marked for identification in this action what was Exhibit C in the previous habeas corpus action, 15648, an envelope which contains three Dictaphone belts.

The Court: Were those in evidence in the other case?

The Clerk: Apparently they were not, your Honor. They only seem to be marked.

Mr. Tobin: I think they were marked for identification only.

Miss Martin: Pardon me just one moment.

The Court: They will be marked for identification in [23] this proceeding, then.

I call the court's attention to the fact that in Exhibit A in evidence here there is attached thereto something called Exhibit 7, which is a folder which contains five Dictaphone belts.

The Court: Are those in evidence?

Miss Martin: They were in evidence in the certified transcript of the Immigration hearing in the habeas corpus case, and they are in evidence here now as part of Exhibit A.

The Court: This entire record is in evidence, so that puts—how many are there in there?

Mr. Tobin: Five.

The Court: Those five are in evidence.

These three are marked for identification.

Mr. Tobin: Yes.

The Court: Do you contend there are some more?

Mr. Tobin: What I contend is that the statement of Mr. Tom Nolan on page 107 of the record before this court was that at that particular date, which I think was October 24, 1951—I may be wrong on that—or it might have been in November of '51, he counted right up before everybody in that hearing room eight Dictaphone belts, in response to the question by Mr. Kearney, the hearing officer, if he had the belts. Then when it was decided to play those belts to determine [24] whether they were the original belts, or whether the statement, Exhibit 7, Exhibit A in this action, was the real McCoy, those eight belts were handed to Mr. Kearney by Mr. Nolan.

Now, the court has precluded me from finding that out from Mr. Kearney and from Mr. Nolan——

The Court: I just got through telling you that I have not.

Mr. Tobin: I had him on the stand.

Miss Martin: You didn't ask him that kind of question.

The Court: You may ask Mr. Kearney if he has any additional belts, and you may ask anyone else if they have any additional belts. I just got through telling you that if they were not before the court in the other proceeding, they may not be in this proceeding, but they may be marked for identification. I have repeated that three or four times, if that isn't clear.

The Clerk: Your Honor, before proceeding further, these have not been identified as plaintiff's or respondent's——

Miss Martin: Government's B.

The Clerk: Government's Exhibit B marked for identification.

(The exhibit referred to was marked as Government's Exhibit B for identification.)

Mr. Tobin: Mr. Kearney, will you please resume the [25] stand?

BERT KEARNEY

recalled as a witness by and on behalf of the plaintiff, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination

(Resumed)

By Mr. Tobin:

Q. Mr. Kearney, how many Dictaphone belts were you handed by Mr. Nolan at the deportation hearing?

Miss Martin: We object to the question unless it is made clear the date of the hearing so that we know exactly what hearing we are talking about.

Mr. Tobin: Page 107, if the court wants to refer to it.

Miss Martin: I also object to the question, your Honor, as incompetent, irrelevant and immaterial. It does not relate to the question of whether there are any additional belts.

The Court: The objection is sustained.

I told you, Mr. Tobin——

Mr. Tobin: Yes, your Honor. I am probably not coming into the right channel.

The Court: You aren't, no. And so as to get you on the right channel, I will explain to you, as I have heretofore explained to you, you may inquire of this witness if he has any additional belts, you may inquire of any other witness whether they have any additional belts. If you have any additional [26] belts, all you need do is present them here and mark them for identification.

(Testimony of Bert Kearney.)

Mr. Tobin: May I be heard, your Honor?

The Court: Yes.

Mr. Tobin: What I am trying to show, your Honor, is this: That they were ordered by Judge Carter to produce the eight belts of the hearing that were presented by Mr. Nolan to Mr. Kearney; that before Judge Carter they produced five, and later produced three more, one of which was taken subsequent to the hearing. Now, if your Honor please, that hearing terminated in February, 1952. If there were eight belts in either October or November, 1951, I want to know where those belts are. They were never in my possession. I never once had them. They were always in the possession of the government. I can't produce any belts. All I can do is go by this record that is here before this court. That is my position, your Honor.

I haven't got those belts. I never even knew Miss Sigurdson on November 2, 1950, never knew she existed.

The Court: I suggest, then, counsel, if I might repeat this once more.

Again, apparently, your concern is that there is a belt missing——

Mr. Tobin: Three.

The Court: Or three. Then ask him if he has the belts, [27] and ask him if he knows where they are, or if he knows whether there are any in existence.

I told you you might ask him that.

Q. (By Mr. Tobin): Mr. Kearney, do you have

(Testimony of Bert Kearney.)

the eight belts that were handed to you by Tom Nolan——

Miss Martin: I object to that question, your Honor, on this ground: That he has——

Mr. Tobin: I haven't finished, please.

Miss Martin: Pardon me.

Q. (By Mr. Tobin): Do you have the eight belts that were handed to you by Tom Nolan, in response to your question during the deportation hearing of Miss Sigurdson in October or November, 1951?

Miss Martin: I object to that question, your Honor, on the ground that it does not identify the the belts in this respect, and therefore it is incompetent, irrelevant and immaterial: There is——

The Court: The objection is sustained. And it is further sustained, counsel—if you would not insist on trying to answer your tricky questions——

Mr. Tobin: I am sorry, your Honor, if you say that is a tricky question. It is a fair question.

The Court: It isn't a fair question. And, as a matter of fact, it is objectionable on the ground it assumes facts not in evidence. [28]

Mr. Tobin: Page 107 of the record. I challenge the court on that.

The Court: There isn't any page 107 of the record of this proceeding.

Mr. Tobin: The record of the Immigration proceedings, your Honor.

The Court: Mr. Tobin, in this proceeding I told you that you might ask him whether or not he has

(Testimony of Bert Kearney.)

any of those records. Now, the proper method of doing what you have in mind, if you feel that he was handed some records, if he says he has no further records and he doesn't know where there are any records, then of course you would be permitted to ask him if Mr. Nolan on such a date handed him certain records, and you would be permitted to ask him as to those records——

Mr. Tobin: All right.

The Court: ——and not ask him a question as to what did you do with the records that were handed to you by Mr. Nolan.

There isn't anything in these proceedings to show anything was handed to him by Mr. Nolan.

Miss Martin: May I say one thing that I think will help clarify it?

There has been identified in this record a November 2, 1950, statement of Miss Sigurdson, which has nothing to do with the hearing, it is just an ex parte statement, not in a formal hearing at all. I believe counsel when he is referring [29] to the eight belts which have now been identified in Government's Exhibit A, and Exhibit B, is referring to belts which were a transcript of some statement given by Miss Sigurdson prior to any hearing. Now, of course when formal hearings began, there were records made of those hearings, and all I would like counsel to do, when he is referring to belts, is to indicate whether he is questioning belts that pertained to the November 2, 1950, statement of Miss Sigurdson, or whether he is referring to formal hearings.

(Testimony of Bert Kearney.)

He calls everthing a hearing, so I would like to have it clear just what he is referring to when he asks the question.

Q. (By Mr. Tobin): Mr. Kearney, do you have any of the belts of the November 2, 1950, hearing in your possession?

Miss Martin: I object to that question on the ground that I don't believe there is a November 2, 1950, hearing.

Mr. Tobin: Preliminary hearing.

Isn't that what it is called?

The Witness: Mr. Tobin, I have no belts in my possession.

Miss Martin: Just a moment.

There is no November 2, 1950, hearing. There was a November 2, 1950, statement prior to the beginning of a formal hearing. If he means "statement," let him say "statement," but let's not have an ambiguity here in this record.

Mr. Tobin: If the court please, I understand that the parlance of the Immigration Service is to call that a preliminary [30] hearing or a preliminary examination. In either event, the record shows clearly what I have in mind by "November 2 hearing."

The Court: Say what you have in mind, then.

Q. (By Mr. Tobin): Do you have any of the belts of the November 2, 1950, preliminary examination of Miss Sigurdson by investigators Habell and Chandler? A. No.

Q. How many belts were there, Mr. Kearney?

(Testimony of Bert Kearney.)

A. How many belts—do you mean of the hearing?

Q. Yes.

Miss Martin: Just a moment. I am going to object unless you make it clear whether you mean how many belts were there at the hearing or how many belts were there of this November 2, 1950, statement.

Mr. Tobin: I am confining myself to the November 2, 1950, preliminary hearing or preliminary examination.

The Witness: I believe there were five.

Q. (By Mr. Tobin): You believe there were five?

A. If you are referring to Miss Sigurdson's statement that was made a part of the record.

Q. I am referring to the belts of the November 2, 1950, hearing. I am not referring to the statement.

A. Was that the hearing that was before me that you are referring to? [31]

Q. Certainly.

A. I don't know how many belts there were.

Miss Martin: Now, your Honor, it appears from the questions that they have been ambiguous. I was trying to get him to clarify whether he was referring to a preliminary statement or the formal hearing before Mr. Kearney.

It is quite obvious that he has been talking about both things at once.

Mr. Tobin: At no time have I been talking about

(Testimony of Bert Kearney.)

the belts before Mr. Kearney. They have never been, to my knowledge, before the court. Counsel is entirely astride from the record on that, your Honor.

The Court: Read the last couple of questions back there.

(The record was read by the reporter.)

The Court: How am I to understand that? The witness asks, "Do you mean the hearing before me?" And you say "Certainly." Then you say "At no time have I been talking about the belts before Mr. Kearney."

Will you straighten that out for me?

Mr. Tobin: Yes. It is very simple, your Honor. Maybe it is because of my familiarity of seven years with this case.

There were no belts—there was a Dictaphone machine employed at the hearing, the deportation hearing before Mr. Kearney, but the belts of that, to my knowledge, have never been before this court or any other court. The only belts of [32] any hearing, and I am now referring to the November 2, 1950, preliminary hearing, were the only belts ever introduced at the deportation hearing before Mr. Kearney, and they are allegedly the belts, according to the government, produced and certified to this court.

Now, I respectfully submit, your Honor, at no time have I been talking of any belts, nor is there any capability of any ambiguity, because the only belts mentioned anywhere in the long history of this

(Testimony of Bert Kearney.)

case are the belts of the November 2, 1950, preliminary hearing.

The Court: Before Mr. Kearney?

Mr. Tobin: And none were introduced before Mr. Kearney. That was not—in 1950 there was no Complaint, and the preliminary examination or hearing was conducted by Mr. Chandler and Mr. Habell.

Miss Martin (To Mr. Tobin): May I ask a question?

You are not saying that the belts which contain the matter of the hearing before Mr. Kearney are involved?

Mr. Tobin: Oh, no.

Miss Martin: So the belts that you are saying were introduced at the hearing before Mr. Kearney were belts that related to the November 2, 1950, statement?

Mr. Tobin: That's right. That has been my position right along.

Miss Martin: And you are not interested in having brought [33] to you the belts which were the belts created at the hearing before Mr. Kearney?

Mr. Tobin: No.

The Court: Do you understand that now?

The Witness: Yes, your Honor, I do.

The Court: He is referring apparently to some belts that were made at the time a preliminary statement was taken, and those belts subsequently were introduced in evidence at the hearing over which you presided.

(Testimony of Bert Kearney.)

That is right, isn't it?

Mr. Tobin: Yes.

The Court: All right. Go ahead.

Q. (By Mr. Tobin): How many belts were you handed by Mr. Nolan? A. Eight.

Q. And that was——

The Court: That was at this hearing presided over by Mr.—when you say handed to him, do you mean presented in evidence?

Mr. Tobin: Handed from one hand—from the hand of Mr. Nolan to the hand of Mr. Kearney.

The Court: Were they presented in evidence?

Mr. Tobin: They were attached to an exhibit. Yes, they were made part of Exhibit 7.

The Court: Okay. [34]

The Witness: There were five, your Honor——

Q. (By Mr. Tobin): And there were——

The Court: Don't you testify. Ask him.

The Witness: It was in the latter part of 1951 or the early part of '52. I don't recollect the date.

The Court: Ask him how many there were.

Q. (By Mr. Tobin): How many did you attach to Exhibit 7 of the deportation hearing record?

The Witness: Your Honor, could I explain my answer?

The Court: You may answer it and then explain your answer.

The Witness: There were five attached to Exhibit 7.

Q. (By Mr. Tobin): And what did you do with the other three, Mr. Kearney?

(Testimony of Bert Kearney.)

A. I believe, to my recollection, they were put in the file.

Q. So the record will be complete now on this, you said it was in the latter part of '51 or early '52. I have before me a copy of the transcript, and on the bottom of each page is given the date, and on page 107 of this transcript it bears the inscription 10-24-51, and that is substantially correct, October 24, '51?

A. I believe so.

Q. Yes.

Have those other three belts been certified to this court [35] at any time?

A. I don't know.

Q. You were present in Judge Carter's court on the same floor as this court, on June 30, 1953, were you not, in response to a subpoena by the petitioner in that habeas corpus proceeding?

A. Yes.

Q. At that time, Mr. Kearney, did you not hear me complain to Judge Carter that the respondent in that petition for habeas corpus did not comply with the order to show cause in that he did not present the eight belts which the court had ordered him to produce?

Miss Martin: I will object to the question on the ground it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Tobin): All right.

Now, during the course of that proceeding on June 30, 1951, Mr. Kearney, did you or did you not hand to the United States Attorney who was handling the case then three additional belts?

Miss Martin: I object to that as incompetent,

(Testimony of Bert Kearney.)

irrelevant and immaterial, and the record is the best evidence of what occurred in any court proceeding.

Mr. Tobin: What I am trying to do, your Honor, is establish the spuriousness of those belts. [36]

The Court: The what?

Mr. Tobin: The spuriousness of those belts. That is what I am trying to do. We contend right along that this is spurious evidence.

The Court: The objection is sustained.

As I got through telling you, I understand that you contended that there were additional belts.

Mr. Tobin: Yes, yes.

The Court: As far as the belts that were before the court before, it is not for me to go into that evidence, any of that evidence, and pass upon it, whether it be belts or testimony. The only reason that I am permitting this, as I indicated before, is if there are some additional belts, which you seem to think there are some additional belts, I want to give you an opportunity to get those belts and mark them for identification.

Q. (By Mr. Tobin): Mr. Kearney, were you told on October 24, 1951, by Mr. Nolan that he had eight belts, but there were more belts used?

Miss Martin: I object to that question, your Honor, on the ground it is irrelevant and immaterial.

The Court: Sustained.

Mr. Tobin: I am trying to establish, your Honor, and bring out the facts that there were more belts.

(Testimony of Bert Kearney.)

At no time did this plaintiff ever have them in her possession. [37]

The Court: The objection is sustained.

He just got through saying that he hasn't the belts and he doesn't know of any other belts.

Q. (By Mr. Tobin): Mr. Kearney, I ask you to look at page 107 of the transcript of the deportation hearing and ask you read from that portion which says, "Counsel Tobin to Examining Officer," down to where it again says "Counsel Tobin to Witness Chandler"—read that, please, just to yourself and see if that refreshes your recollection.

Miss Martin: Your Honor, I am going to object to any questions upon the ground that this transcript does not relate to anything in which Mr. Kearney was either questioning or answering. These are questions and answers by someone not a witness on the stand, so this is not proper impeachment, and I object to any further questions.

The Court: The important thing is not the question of impeachment, the important thing is it couldn't refresh his recollection if it is not his statement.

Mr. Tobin: It does happen to be in response to his question, your Honor, and I only identified it on that page——

The Court: I understood her to say no.

Miss Martin: It is my understanding that it is not Mr. Kearney's questions. I may be in error.

The Court: Has he finished reading the question

(Testimony of Bert Kearney.)

or the questions and answers that you asked him to? [38]

The Witness: Yes, I have, your Honor.

The Court: All right. Now you may ask him the question.

Q. (By Mr. Tobin): Does that refresh your recollection?

The Court: Just a moment.

There is nothing before me, so I don't even know what you are talking about, and I can't rule on it.

In order for it to be before me, if you will read the questions and answers, and then ask the witness whether it refreshes his recollection, at that time you may make your objection.

Q. (By Mr. Tobin): "Q. And I believe you testified—you stated, Mr. Nolan"—

The Court: Question by whom?

Mr. Tobin: Counsel Tobin to Examining Officer.

"Q. And I believe"—

Miss Martin: Pardon me a moment.

Is he being allowed to read from this record, which so far has not been identified as being any questions or answers given by the witness Mr. Kearney?

These are questions propounded by Mr. Tobin.

The Court: You have misrepresented to the court, Mr. Tobin.

Mr. Tobin: It is my understanding that it is Mr. Kearney, and it is my understanding that Mr. Kearney did ask Mr. Nolan. It does not so appear here on the record. [39]

(Testimony of Bert Kearney.)

The Court: Then the objection is sustained.

Q. (By Mr. Tobin): Do you have any knowledge that there were more belts used at that preliminary hearing in 1950, Mr. Kearney?

A. No.

Q. And you were presented eight, all right.

Miss Martin: I object to that and move to strike counsel's last statement as not being a correct statement of what Mr. Kearney's testimony is, and move to strike his voluntary statement.

The Court: The motion to strike is granted.

Q. (By Mr. Tobin): All right.

How many belts were you presented by Mr. Nolan, Mr. Kearney?

Miss Martin: I object to that on the ground it has been asked and answered.

The Court: Overruled.

The Witness: Eight.

Mr. Tobin: That is all.

Mr. Nolan.

Miss Martin: I want to ask a question or two.

Cross-Examination

By Miss Martin:

Q. At the time Mr. Nolan handed you the eight belts, do you [40] recall what he said with regard to the eight belts? A. No, I don't specifically.

Q. What did you do with the eight belts at that time?

A. Eight belts were presented. There had been offered in evidence a statement by Miss Sigurdson,

(Testimony of Bert Kearney.)

and there was some question about that statement——

Q. Don't tell me that. Just answer the questions. What did you do with the eight belts?

A. I played five of them back on the Dictaphone machine.

Mr. Tobin: I object to that as improper and incorrect, your Honor, and not a correct representation of page 107, to which the direct examination was predicated. The direct examination was predicated solely as to the number of belts.

If she wants to take him over for her witness at this time on that score, it is perfectly okay.

The Court: The objection is sustained.

Q. (By Miss Martin): Did you make any of those belts an exhibit in the hearing that was being held before you?

A. I attached them to Exhibit 7, according to my recollection.

Q. How many belts did you attach to Exhibit 7?

A. Five.

Q. What did you do with the other three?

A. I believe they were put in the file, the file jacket, that I had before me. [41]

Q. Is there any reason why you did not attach the other three to the Immigration file as an exhibit at that time?

A. Yes.

Q. What is the reason.

A. I played the five belts back that corresponded with the statement, and when those five belts had been played back and were found to be substantially

(Testimony of Bert Kearney.)

in conformity with the statement, I didn't play the other three because there was no necessity for it.

Miss Martin: No further questions, your Honor.

Redirect Examination

By Mr. Tobin:

Q. Have you ever played the other three belts, Mr. Kearney? A. Never.

Q. You don't know what they refer to?

A. No, I don't.

Q. Mr. Kearney, when did you first learn that it only took five belts to make that statement?

A. At the hearing before me.

Q. At the hearing.

Did you know it only when those five belts were completely played, or did you know it beforehand?

A. At the time I played the belts back. [42]

Q. In other words, so there will be no confusion in the record, you did not know that the eight belts were required to play that statement when you started to play it on the Dictaphone machine?

Miss Martin: I object to that, your Honor, as incompetent, irrelevant and immaterial, and a leading question, and assuming a fact not in evidence.

The Court: Overruled.

It is really argumentative. I will permit that one question.

Mr. Tobin: It is preliminary, your Honor. I have two of them.

The Court: I will permit that one question. I am not going to permit you to go into this. You

(Testimony of Bert Kearney.)

may ask him that for the purpose of refreshing his recollection, if possible, as to what happened to the other belts.

The Witness: I have forgotten the question.

The Court: Read the question.

(Question read by reporter.)

The Witness: That is correct.

Q. (By Mr. Tobin): I now refer to page 145 of the transcript of the deportation hearing conducted before you, dated at the bottom 11-6-51, and ask you to read the statement by hearing officer. Will you please read that page there, page 145? [43]

Do you now wish to change your testimony, Mr. Kearney?

Miss Martin: I object to that question, your Honor, as incompetent, irrelevant and immaterial, and not proper impeachment, and assuming a fact not borne out by the record.

The Court: I assume that he is not attempting to impeach this witness, but what he is attempting to do is refresh his recollection.

Mr. Tobin: To refresh his recollection.

The Court: Again I must ask you to read the statement and ask him if it refreshes his recollection.

Mr. Tobin: Does that refresh your recollection, Mr. Kearney?

The Court: Will you read it, please? I can't rule on it unless I know what is in there.

Mr. Tobin: I am reading from page 145 of the deportation hearing of Miss Sigurdson conducted

(Testimony of Bert Kearney.)

before Mr. Kearney, the witness on the stand, dated 11-6-51.

“By Hearing Officer: For the purpose of the completion of the record, we have listened to the recording of the memo belts 1 and 2 of the transcript previously referred to. It is noted that we started on these belts at 10:55 a.m., and finished two belts at 11:55 a.m. Inasmuch as there are approximately two and one-half more belts and it is lunch time, I will declare a recess until 1:00 p.m.

“By Examining Officer: Mr. Hearing Officer, for the [44] purpose of the record, we are now on page 18, following the playback.

“By Hearing Officer: Is that understood?

“By Counsel: Yes.

“By Hearing Officer: All right: Hearing continued until 1:00 p.m.”

Does that have any tendency to cause you to refresh your recollection, Mr. Kearney?

A. It doesn't refresh my recollection any further than it was before.

Q. Then you knew on 11-6-51, before that statement Exhibit 7 in your deportation hearing was completed on the Dictaphone, you knew that it only took five belts to handle it, didn't you, Mr. Kearney? Isn't that what your statement is here?

A. It indicates that, yes.

Q. Well, if it indicates that, do you want to change it?

The Court: Counsel, don't argue with the witness. We have been here an hour doing nothing.

(Testimony of Bert Kearney.)

Q. (By Mr. Tobin): Do you wish to change your testimony?

Miss Martin: I object to the question, "Do you wish to change it."

He keeps inferring that Mr. Kearney has testified previously [45] to something different, and he has not.

The Court: The objection is sustained.

Mr. Tobin: That's all.

The Court: We will take a five-minute recess.

(Recess taken.)

The Court: You may proceed.

Mr. Tobin: Mr. Nolan, will you please take the stand?

THOMAS J. NOLAN

recalled as a witness by and on behalf of the plaintiff, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination

(Resumed)

By Mr. Tobin:

Q. Mr. Nolan, how many belts did you hand the hearing officer Kearney on October 24, 1951, as the belts of the preliminary hearing of Miss Sigurdson on November 2, 1950? A. As I recall, five.

Q. You handed five belts?

A. As I recall, I had eight in my hand—in other words, if I may explain—

Q. Yes, I would like to hear this.

(Testimony of Thomas J. Nolan.)

A. A request was made for the belts. I had the file. I took from the file all of the belts contained therein, eight in number. I took the eight belts in my hand, and as I [46] recall, in substance, told Mr. Kearney as the presiding officer that five of them related to the statement. In other words——

Q. When did you tell him that, Mr. Nolan?

A. As I recall, at that time. However, I have no absolute recollection.

Q. Did you tell him that during the hearing, in open hearing, or did you tell him subsequently at another time?

A. I do not recall except to the best of my recollection it was at that time.

Q. I now ask you to take a look at page 107——

Miss Martin: Just a moment. Pardon me.

Are you using the exhibit in court?

Mr. Tobin: No. This is my copy of the transcript, and I presume it is the same. It was furnished to me by the government.

Miss Martin: I think we should use the court exhibit, if you please. We happen to have it here and we will give it to you. I don't think we should be examining from——

The Court: Isn't it the same thing?

Miss Martin: I don't know, your Honor. He has it in his possession. How do I know?

Mr. Tobin: It was furnished to me by the government, your Honor, and I signed a receipt for it.

The Court: I assume, again, that he is going to ask him [47] with reference to a statement that he

(Testimony of Thomas J. Nolan.)

previously made for the purpose of refreshing his recollection.

Mr. Tobin: That's right.

The Court: In order to refresh his recollection, it is going to be necessary for him to read it. When he does, you can follow it in your copy.

Q. (By Mr. Tobin): I ask you to read from a copy of the transcript of the deportation hearing of Miss Sigurdson dated 10-24-51, on page 107, from the portion approximately a third down from the top where it says "Counsel Tobin to Examining Officer," down to where it says "Counsel Tobin to Witness Chandler."

Will you please read that, Mr. Nolan.

The Court: Wait a minute now.

Mr. Tobin: It is his statement, your Honor.

The Court: I understood you to say "read down to where it says "Counsel Tobin to Chandler." This witness' name is not Chandler.

Mr. Tobin: I am pointing out the area which I want him to read, from "Counsel Tobin to Examining Officer." I don't want him to read that other part.

The Court: You are referring only to his testimony?

Mr. Tobin: Only to his statement, your Honor, yes.

"Counsel Tobin to Examining Officer:

"Q. And I believe you testified—you stated, Mr. [48] Nolan, that you have the belts?

"A. I have.

(Testimony of Thomas J. Nolan.)

“Q. How many belts were there?

“(Examining Officer counts belts.)

“A. There are one, two, three, four—four complete belts; two approximately half belts; and there are two other belts combined which would make about one belt, so actually that would make six or five and—now there were more belts than that were used.”

Does that refresh your recollection as to what you stated on October 24, 1951, Mr. Nolan?

The Witness: Not entirely, counsel.

Q. (By Mr. Tobin): It doesn't. But you did so count the belts at the hearing?

A. I apparently did at that time. However, may I add this? That the statement, or rather, the record of hearing taken out of context that you just gave me does not completely refresh my mind as to the actual proceedings. I do not know now the time covered, inasmuch as you, I believe, covered this particular point on more than one occasion.

Q. I now hand you, Mr. Nolan, the complete transcript consisting of two volumes and cover, and then a third volume furnished me by the Immigration Service, and see whether that is taken out of context, or will you please point out to the court where there is any different statement from you in the [49] entire deportation proceedings on that score.

Miss Martin: Now, your Honor, I am going to

(Testimony of Thomas J. Nolan.)

have to object to him using his own records in this instance.

The Court: The objection is sustained.

In addition to that, I am not going to have him reading the entire record.

His counsel will have an opportunity if there is any other part of the record that relates to this matter.

Mr. Tobin: All right.

Q. Now, is there any other part of this record which relates to the number of belts used by Chandler and Habell on November 2nd at the 1950 preliminary hearing?

A. I do not know, counsel. I have not read this record for many years. In fact, I have not read it since the time that I presented it on behalf of the government.

Miss Martin: And I object to the question, your Honor, that the record is the best evidence of what it relates to.

The Court: The objection is overruled this time, because the answer is in and he has stated what is quite obvious, that he wouldn't know, and it is a voluminous record.

Q. (By Mr. Tobin): Mr. Nolan, do you recall a request being made at the deportation hearing of Miss Sigurdson to the Hearing Officer for permission to take those Dictaphone belts, five which were used to make the transcript Exhibit 7, plus the other three belts, to the Dictaphone Corporation for examination? [50]

(Testimony of Thomas J. Nolan.)

Miss Martin: I object, your Honor, unless it is indicated the date of the hearing to which he is referring.

The Court: The objection is sustained.

Mr. Tobin: I am trying to find it.

The Court: And besides it is immaterial.

Q. (By Mr. Tobin): As a matter of fact, Mr. Nolan——

The Court: You are not contending that Miss Sigurdson took those belts, are you?

Mr. Tobin: No.

The Court: Then I think it is immaterial. I think the thing we are interested in is trying to find the belts.

Q. (By Mr. Tobin): Do you know where those other three belts are, Mr. Nolan?

A. I don't know what has happened to them since I last had them.

Q. And the last time you had them was October 24, 1951, was it?

A. Was that the date of the hearing?

Q. That was the date that you handed them to Mr. Kearney.

A. That is the last time I recall seeing them, the last time we were in a session where we were involved and I was connected. I do not recall the exact dates.

Mr. Tobin: That is all. [51]

Miss Martin: Just one question.

(Testimony of Thomas J. Nolan.)

Cross-Examination

By Miss Martin:

Q. At that time the three belts were in the file in the Sigurdson matter, is that correct?

A. That is correct.

Q. And they remained there to the best of your knowledge?

A. To the best of my knowledge, they did.

Mr. Tobin: I object to that, if your Honor please, as assuming a fact not in evidence.

Q. (By Miss Martin): Were they ever taken out of the file as far as you know?

A. During the period of time that I had the file in my possession I may have had them physically in my hands. I do know what they contained. I know what the eight belts covered.

Q. The last time you saw those records, had you returned them to the Sigurdson file?

A. I had.

Mr. Tobin: Did I understand you to say that the last time you had those eight belts you returned them to the Sigurdson file?

The Witness: Three.

Miss Matrin: My question pertained to the three belts, [52] the remaining three belts which were not identified in evidence. My questions are ambiguous. I am sorry.

Mr. Tobin: Can I hear the record read?

The Court: Straighten it out now. Ask your question over again.

(Testimony of Thomas J. Nolan.)

Q. (By Miss Martin): Referring to the three belts not identified as an exhibit at the hearing, the last time you saw those three belts, did they remain in the Sigurdson file in the Immigration Service?

A. Yes, they did.

The Court: All right.

You may step down.

Mr. Tobin: May I ask him a question?

Redirect Examination

By Mr. Tobin:

Q. Did you have control of that file until it was delivered to court? A. No, I did not.

Q. Who had control of it, Mr. Nolan?

A. The file was in my possession for review prior to the hearing, during the course of the hearing, and upon the completion of the hearing when the government had rested, as well as yourself, the file was then—it then left me and remained within the Immigration office. In whose custody it was [53] other than Mr. Del Guercio, I do not know, but I no longer had possession. I had possession of the file prior to the hearing, I reviewed the eight belts, I know what was contained in those belts, I know when the material was gathered for those belts.

Q. Was that material gathered on November 2, 1950? A. A portion of it.

Q. Was there anything in those three belts subsequent to November 2nd and prior to October 24, 1951? A. Yes.

(Testimony of Thomas J. Nolan.)

Q. There was. And was that a statement of Miss Sigurdson?

A. No, it was not. The five belts related to Miss Sigurdson. The other belts, one of them related to you, a statement which you made at your request, as I recall. The other two were part, or at least a portion of the three related to the investigative stage of the proceeding that consisted of a statement by a witness who later appeared and testified in the hearing on behalf of the government.

Q. Not that it matters, but you said that you have a belt of a statement made by me prior to the hearing at my request?

A. As I recall, it was at your request.

Q. Could you be in error?

A. No, I don't believe so. [54]

Q. I suggest that you hear them again, Mr. Nolan. I now once again hand you 107—may we read it together——

Miss Martin: Are you referring to page 107 of Exhibit A?

Mr. Tobin: The same page that we heretofore referred to.

Miss Martin: In Exhibit A?

Mr. Tobin: In Exhibit A.

Q. This statement about the belts referred specifically, concisely, definitely, and exclusively to this statement of November 2nd, did it not?

Miss Martin: I object, your Honor, on the ground that it is an ambiguous question and it is leading and improper.

(Testimony of Thomas J. Nolan.)

The Court: Sustained.

You are not reading from that exhibit now?

Mr. Tobin: No.

The Court: Sustained.

Q. (By Mr. Tobin): Mr. Nolan, in order that the record will be absolutely certain and there will be no question, the examining officer is equivalent to the attorney for the government in a deportation hearing; is that right?

A. That is correct.

Q. Page 107 had to do—the portion that you heretofore read—had to do with the testimony of Mr. Chandler, did it not?

A. If you say it did. [55]

Q. You have no definite recollection about it?

A. No, I have not.

Q. All right.

Then, take a look at it, please, and I want you to take a look at page 106 and see if all of the discussions there, the questions of counsel to Mr. Chandler, refer to November 2nd. The same pertains to the top of page 107, the three questions and answers. And then when you do that, Mr. Nolan, will you then please tell us whether or not your statement as to eight belts, and that there were more used, didn't refer exclusively and only to the November 2nd, 1950, preliminary examination. Please look at the record.

Miss Martin: I object to the question, your Honor, on several grounds. First, it assumes a fact not in evidence when it states that Mr. Nolan's

(Testimony of Thomas J. Nolan.)

statement is that there were more than eight belts; and, in addition, it refers to testimony or questions and answers which are not questions and answers by Mr. Nolan. In that respect the record speaks for itself and it is an improper question and is immaterial.

The Court: And very ambiguous.

Miss Martin: And ambiguous.

Mr. Tobin: May I be heard on that, your Honor?

The Court: Yes.

Mr. Tobin: The statement that Mr. Nolan read, and which I read into the record, specifically and very concisely says [56] that there were eight belts and more belts used that day.

I am not using the exact language. The Court heard it and the witness has it before him.

Miss Martin: The record speaks for itself in that regard, your Honor. This is a matter of argument. I don't so interpret it.

Mr. Tobin: I am trying to show the Court my position on this point.

Now, if your Honor please, the witness now says that there were five belts of that preliminary hearing of November 2nd. Yet on October 24, 1951, at that deportation hearing, when the only belts that were being discussed were the belts of that preliminary hearing, Mr. Nolan stood up and counted eight Dictaphone belts, and he then made the statement on the record and said that there were eight and more were used, and that was specifically re-

(Testimony of Thomas J. Nolan.)

ferring and definitely referring, and only referring, if the Court please, to the November 2nd preliminary hearing or examination.

Miss Martin: I don't know if this is the time for argument, but I certainly disagree entirely with his construction of that testimony.

The Court: Counsel, I don't care to hear from you. Just let him make the statement. He wanted to make a statement of his position.

All right. You may proceed. [57]

Mr. Tobin: Can you answer the question?

The Court: I have already ruled on the question, counsel. I sustained an objection to the question. You stated you wanted to make your position clear for the record and I permitted you to do it.

Mr. Tobin: Thank you, your Honor.

Q. (By Mr. Tobin): Mr. Nolan, did you have possession of those five belts after the hearing was terminated? A. No, I did not.

Q. As a matter of fact, you didn't have possession of those eight belts after October 24, 1951, did you, Mr. Nolan?

A. It would have been shortly thereafter, whatever time I transferred the file.

Q. I am referring to the time that you handed them to Mr. Kearney; assuming that it was October 24th, you didn't have them in your possession after that at any time? A. Not that I recall.

Mr. Tobin: That's all.

The Court: Before the witness leaves the stand,

(Testimony of Thomas J. Nolan.)

rather than my asking him a question, I assume I can dispose of this by stipulation.

It is a little difficult to follow this kind of testimony, but I assume it may be stipulated that of the eight belts that have been referred to here, that five of those belts and only five were presented in evidence at the Immigration hearing of [58] November 2nd?

Miss Martin: I would so stipulate, your Honor.

The Court: And that the other three, which appear to be unaccounted for, were not in evidence, there were just these five belts that went in evidence that were before the hearing officer, considered by the hearing officer?

Mr. Tobin: Yes. I stipulate that that is the status, and we are referring to the belts as set forth on page 107 of the Immigration transcript.

The Court: I haven't read the report, but I just wanted to clear that up in my own mind. In other words, five belts and five belts only, and those five belts that are presently in evidence here are the only belts that were considered by the hearing officer at the time he passed upon the question of the deportability of the alien?

Mr. Tobin: Now, the Court has made a little different thing. The Court has said, "the only belts that were considered." I thought it was the only belts put in evidence.

The Court: The only belts that were before the hearing officer, the only ones that went in evidence?

Mr. Tobin: That's right.

(Testimony of Thomas J. Nolan.)

The Court: I am referring to all the hearings, any and all of the hearings, that there were just five belts that were before the hearing officer?

Mr. Tobin: Yes. [59]

The Court: And those five belts are the five belts that are presently in evidence here and were in evidence in the habeas corpus proceedings; the other three belts, which you have been inquiring about, were not in evidence or before the hearing officer, nor were they in evidence in the habeas corpus proceeding, nor are they in evidence here? Is that right?

Mr. Tobin: That's right.

Miss Martin: With this one correction: That in the habeas corpus proceeding there was identified as Exhibit C, that is action 15648, an envelope containing three belts.

The Court: They were marked for identification?

Miss Martin: Marked for identification.

The Court: But they were not in evidence?

Miss Martin: That is right.

The Court: Which of course would not mean so much to the layman, but which means to lawyers that the others were the only belts that were considered, so that the five belts were the only belts considered by the hearing officer Kearney in determining the question of the deportability of the alien.

Is that right?

Mr. Tobin: That's right, your Honor.

(Testimony of Thomas J. Nolan.)

The Court: All right.

Q. (By Mr. Tobin): Mr. Nolan, you heard those belts played at the hearing?

Miss Martin: Are you referring now to the five belts? [60]

Mr. Tobin: Yes.

There were only five belts played, isn't that right, Mr. Nolan?

A. I don't have any personal recollection of them being played, but I believe they were played at the hearing.

Q. How many clicks were heard at the time, Mr. Nolan?

Miss Martin: I object, your Honor, on the ground it is incompetent, irrelevant and immaterial, and the witness has already stated that he has no recollection of them being played.

The Court: Sustained. It wouldn't make any difference whether he recollected or not, it would still be immaterial.

Q. (By Mr. Tobin): Mr. Nolan, you are familiar with Dictaphone machines of the type in use and employed by the Immigration Service in 1950, are you not?

Miss Martin: Objected to on the ground it is incompetent and immaterial and irrelevant.

The Court: Sustained.

Q. (By Mr. Tobin): Mr. Nolan, in the course of your duties as an examining officer for the Immigration Service, during the years 1950 and 1951, you have played belts made by investigators and by

(Testimony of Thomas J. Nolan.)

yourself on Dictaphones for the purpose of having a playback, have you not?

Miss Martin: I object. It is immaterial.

Mr. Tobin: For the purpose of laying a foundation, your [61] Honor.

The Court: Mr. Tobin, when this witness was on the stand before, I made my ruling. You are going into that same matter again, and the ruling still applies. I permitted you to put this witness back on the stand because you indicated to me that you thought there were some additional belts.

Mr. Tobin: That's right.

The Court: And I told you that I would permit you to delve into that for the purpose of ascertaining whether there were any belts and have them marked for identification if they could be found.

Mr. Tobin: That is all.

Miss Martin: I want to ask one question, if your Honor please.

Recross-Examination

By Miss Martin:

Q. I show you Government's Exhibit C for identification, which appears to be three Dictaphone belts——

The Clerk: Miss Martin, that is now Exhibit B.

Miss Martin: That is correct, Exhibit B for identification, which appears to be three Dictaphone belts, and ask you to look at those belts and tell me whether there are any identification marks on there that refresh your recollection as to whether or not

(Testimony of Thomas J. Nolan.)

you have ever seen those three particular belts [62] before? A. Yes.

Q. Your recollection is refreshed as to whether you have ever seen them before?

A. I believe that I have.

Q. And where was that?

A. If I may explain.

Q. Yes.

A. Prior to this moment I did not recall the names—the name of one of the witnesses who had appeared on behalf of the government in the case, in the deportation hearing of Miss Sigurdson. However, I do recall that he appeared in only one case. He had not testified in other hearings, as far as I know.

Q. Is the name of that witness there?

A. His name appears on one of those belts, which would indicate to me that this is the statement taken from him in the subject case.

Q. And does that refresh your recollection as to whether you ever saw that belt before?

A. Not absolutely. I could not actually testify that these belts are the ones that I have seen. There is some writing on here, an impression; however, in the light I am unable to make it out clearly.

Q. Without having the belts played back on the replay [63] record, you wouldn't know whether or not those are the three belts that you referred to in your testimony here this morning?

A. No, I would not.

(Testimony of Thomas J. Nolan.)

Q. The witness whose name appears on one of these belts, what is that name? A. Kerr.

Q. In what case was he a witness?

A. In the case of Halldora Sigurdson, as I recall.

Q. Do you spell that K-e-r-r? A. Yes.

Miss Martin: That is all.

Mr. Tobin: Mr. Nolan, I am glad to hear that Immigration Service hasn't used the perjurer, Mr. Kerr.

No more questions.

Miss Martin: I think, just for the record, your Honor, I should move to strike that statement of counsel as improper.

The Court: What was the statement of counsel?

(The record was read by the reporter.)

The Court: It may be stricken. And, Mr. Tobin, I want to warn you against making any further statements of that type.

Mr. Tobin: At this time, your Honor, I realize the hour, and we have a witness, Mr. Barnhill, from the Dictaphone Corporation, and there is some kind of a convention going on in [64] town of commercial machinery and office equipment, and also there is the opening of a show at the Shrine Auditorium, I believe, tomorrow, and Mr. Barnhill asked me if he could be put on so he could be excused, because he has a great deal of duties in connection with the show and with the convention. It may be that we don't even have to put him on, but I will make the

(Testimony of Thomas J. Nolan.)

offer of proof that Mr. Barnhill, who is a representative of the Dictaphone Company, would testify, if called to the stand, that the Dictaphone machines made by his company and sold by his company during the years 1950 and '51 were of the type that would show a click each time it was stopped and started again on the same belt, and that would be audible if the belt was played back for purposes of a playback.

Will I be allowed to prove that testimony?

The Court: That is your offer of proof?

Mr. Tobin: Yes, your Honor.

Miss Martin: I will object, your Honor, on the ground it is incompetent, irrelevant and immaterial, and outside the scope of the issues in this case. I don't see the materiality of it, for one thing.

The Court: The objection is sustained.

Mr. Tobin: May Mr. Barnhill then be excused, your Honor, as a courtesy?

The Court: Yes; he may be excused. [65]

Mr. Tobin: Mr. Chandler, will you please take the stand?

ORAL KENNETH CHANDLER

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Oral, O-r-a-l, Kenneth Chandler.

(Testimony of Oral Kenneth Chandler.)

Direct Examination

By Mr. Tobin:

Q. Mr. Chandler, you were one of the investigating officers for the Immigration Service that took the statement of Miss Sigurdson on November 2nd and recorded it on a Dictaphone belt?

A. I took a statement from Miss Sigurdson—I am not certain of the date——

Q. I am referring, Mr. Chandler, to the one that was taken by you and Mr. Habell in Room 227 of your office on that very warm afternoon. Do you recall it now? Does that refresh your recollection?

A. I recall taking a statement from Miss Sigurdson with Mr. Habell.

Q. At that time, Mr. Chandler, you were not directly [66] connected with the investigation of the Sigurdson matter?

Miss Martin: I object, your Honor. It is immaterial.

The Court: It is a preliminary question. I assume that you are adhering to the court's ruling in that you have put Mr. Chandler on for the purpose of ascertaining whether he knows anything about any additional——

Mr. Tobin: Belts, yes, your Honor.

The Court: All right.

Q. (By Mr. Tobin): At that time you were not investigating officer in chief, shall we say, in the Sigurdson deal?

(Testimony of Oral Kenneth Chandler.)

A. At that time I was not the officer to whom the case was assigned, that is correct.

Q. And that officer was Mr. Habell who is now in court?

A. That is the best of my recollection.

Q. And that preliminary hearing or preliminary examination took from shortly after 1:00 o'clock to approximately 4:45 on November 2, 1950?

Miss Martin: I object, your Honor; it is immaterial. It does not relate to whether or not the record is complete.

The Court: The objection is sustained.

Q. (By Mr. Tobin): How many belts, how many Dictaphone belts were employed that day, Mr. Chandler, in recording the statement of Miss Sigurdson?

A. To the best of my recollection, five. [67]

Q. To the best of your recollection, five. When did you secure that recollection, Mr. Chandler?

Miss Martin: I object to that as incompetent and immaterial.

The Court: Overruled.

Mr. Tobin: I beg your pardon?

The Court: Sustained, rather.

Q. (By Mr. Tobin): You testified at the deportation hearing of Miss Sigurdson, Mr. Chandler, did you not? A. I testified, yes, Mr. Tobin.

Q. And I now——

The Court: Before we waste any time on that, counsel, you surely can't be attempting to refresh

(Testimony of Oral Kenneth Chandler.)

his recollection, because he hasn't testified to anything here.

Mr. Tobin: He said there were five belts used that day. He said there were five Dictaphone belts used that day.

The Court: I see. You want to refresh his recollection on that?

Mr. Tobin: Yes.

Q. I now hand you a copy of the transcript of this deportation hearing and ask you to look at this one question immediately above "Counsel Tobin to Examining Officer" on page 107, on the sheet dated 10-24-51. Will you please read that question and answer? A. This one right here? [68]

Q. Yes. A. Whose testimony is this?

Q. Take a look if you want to see. Look back and refresh your recollection to see who was testifying, whether or not it was you.

A. I have read the question.

Mr. Tobin: I am reading from page 107. Question to Mr. Chandler by me, and then the answer by you. Do you confirm that fact?

The Witness: You are reading from the transcript, yes.

Q. (By Mr. Tobin): "Q. Yeh, and how many belts do you know were employed that afternoon?

"A. I don't know."

Does that cause you to want to change your testimony this morning about the five belts?

A. Not at all, sir. You asked me my recollection, and that is my present recollection.

(Testimony of Oral Kenneth Chandler.)

Q. This is now almost seven years from the date of that hearing, six and a half years, is it not, Mr. Chandler?

Miss Martin: I object. It is argumentative.

The Court: Sustained.

Q. (By Mr. Tobin): All right.

Now, Mr. Chandler, this deportation hearing was exactly a year—I beg your pardon—was exactly 11 months—no. This was exactly nine days short of one year that you testified [69] you did not know how many belts. Now, how do you account for your memory or recollection being better today than it was in 1951, Mr. Chandler?

Miss Martin: I object. It is argumentative and it assumes facts not in evidence.

The Court: Sustained.

Q. (By Mr. Tobin): Now, Mr. Chandler, will you please tell the court and the record what is the basis for you saying that there were five belts used that day?

A. As I recall your original question, Mr. Tobin, it was did I recall the number of belts that were used in that statement. My memory today tells me that there were five. Now, the basis for that recollection I cannot state. That is my best recollection.

Q. But you didn't know on November 24 how many were used, did you?

Miss Martin: I object to that as incompetent and immaterial. It has been asked and answered.

The Court: Sustained. And it is argumentative.

Q. (By Mr. Tobin): Did you have charge of

(Testimony of Oral Kenneth Chandler.)

those belts at any time subsequent to the hearing on November 2nd, Mr. Chandler?

A. Are you speaking——

Q. Prior to the deportation hearing in October.

Miss Martin: I am going to object to that, your Honor, [70] again, as ambiguous, because he is referring to a hearing on November 2nd. I assume he means at the time the statement was taken from Miss Sigurdson on November 2, 1950.

The Court: The objection is sustained.

Q. (By Mr. Tobin): Directing your attention to the period November 2, 1950, to October 24, 1951, during that period did you have charge of the Dictaphone belts employed at the preliminary hearing on November 2nd of Miss Sigurdson?

A. It is my recollection that during that period the investigative case was assigned to me for investigation. In the file were contained the belts taken during the statement of Miss Sigurdson in 1950.

Q. How many belts were there during that time?

Miss Martin: I object to that question as ambiguous.

Q. (By Mr. Tobin): During the time that you had possession of the file, during the period I previously outlined, how many belts were there in the file?

A. To the best of my recollection, there were eight belts contained in the file.

Q. And that was all during the time that this was in your possession?

(Testimony of Oral Kenneth Chandler.)

A. At the time I received the file, as I recall, there were six belts. Two belts——

Q. Six belts. What was the date?

Miss Martin: Just a moment. Let the witness finish the [71] answer to his question.

Mr. Tobin: I am sorry if I interrupted you. Will you please give us the date that you received the file?

Miss Martin: Would you please permit the witness to finish the answer?

Mr. Tobin: The court will control me.

The Court: I have great difficulty controlling you, Mr. Tobin. You want to talk while everybody else is talking.

Is there a question?

Miss Martin: Will you ask the reporter to read the previous question and let the witness complete his answer?

The Court: Yes.

(The following portion of the record was read by the reporter):

“Q. And that was all during the time that this was in your possession?

“A. At the time I received the file, as I recall, there were six belts. Two belts——

“Q. Six belts. What was the date?”

The Court: Had you finished your answer?

The Witness: No.

Am I now to?

The Court: Yes.

(Testimony of Oral Kenneth Chandler.)

The Witness: Two belts were later secured, or were later made—testimony was later made on two belts in my presence [72] during the time that I had the file.

Q. (By Mr. Tobin): What was the date that you received those six belts, if you recall? I don't mean with exactitude, but generally.

A. I am sorry to say that I am unable to recall.

Q. Was that about the time that Mr. Habell went back into the service?

A. That is conceivable, but I cannot so state.

Q. Was that in April, 1951?

A. I do not know.

Q. All right. Now, you say that there were six belts when you took possession of the file——

A. That is to the best of my recollection, yes.

Q. What was the extra belt about?

A. As I recall, that was a statement made by you concerning Miss Sigurdson.

Q. What was the date on that?

A. I don't know the date on it, Mr. Tobin.

Q. What were those two other belts about that were later added?

A. The two belts that were later added consisted of testimony taken from a witness concerning his knowledge of Miss Sigurdson.

Q. Both of them were of that?

A. That is my best recollection. [73]

Q. When did you part with those belts, Mr. Chandler?

(Testimony of Oral Kenneth Chandler.)

A. Are you asking for a specific date, Mr. Tobin?

Q. No. Roughly. A. May I explain?

Q. Surely.

A. Under normal procedure when sufficient evidence is gathered to apply for a warrant of arrest, and a warrant of arrest is issued, the file passes from the control of the investigator, and it is my recollection that such took place with respect to Miss Sigurdson's case.

Q. Approximately when was that, do you know?

A. No, I do not.

Q. If I refresh your recollection and tell you that the warrant was dated, I think, October 10, 1951, does that refresh your recollection?

A. Only with reference to the general procedure I have described to you.

Q. What was the S.O.P. insofar as time on that?

Miss Martin: I object to that. It is ambiguous, S.O.P.

Q. (By Mr. Tobin): You know, your standard operating procedure. Would it be a month before, or would it be two weeks before that you parted with it?

A. I am sorry. It is just that I don't understand the question.

Q. Mr. Chandler, you say that you parted with the belts [74] after a warrant was issued; is that right?

A. Normally that was—I would say that was

(Testimony of Oral Kenneth Chandler.)

our standard procedure, when a warrant was issued normally the file was surrendered.

Q. So after you made your affidavit or certificate to Washington in accordance with the rules which were in existence at that time for a warrant, did you still retain the belts?

A. Only so long as the file was in my possession.

Q. What I am trying to find out, Mr. Chandler, is approximately how soon before October 10th or 11th did you part with those belts?

A. I don't know.

Q. And to whom did you give them then?

A. The entire file would normally be transferred to the examining officer to set a date for hearing, for deportation hearing.

Q. In this particular case, Mr. Nolan?

A. I believe Mr. Nolan conducted the hearing, therefore he must have been the man to whom the file was sent.

Q. Are you now referring to the examining officer or the hearing officer?

A. The examining officer, Mr. Nolan.

Q. That would be Mr. Nolan?

A. That is correct. [75]

Mr. Tobin: That is all.

(Testimony of Oral Kenneth Chandler.)

Cross-Examination

By Miss Martin:

Q. Do you recall at this time what was the name of the witness whose testimony was transcribed on the two other belts you referred to?

A. I recalled it only when it was brought out in the testimony of Mr. Nolan. Previous to that I did not recall.

Q. But do you now recall it?

A. Kerr. I couldn't even tell you the first name.

Q. I show you Government's Exhibit B for identification, which is an envelope which contains three Dictaphone belts, and ask you to look at those Dictaphone belts and see if there is anything there that refreshes your recollection as to whether you have ever seen those belts before.

A. Yes. The slip on there is in my handwriting and bears my initials, which would indicate to me that those are belts which I—at which I was present when the testimony was taken.

Q. Will you indicate what you mean by "the slip which bears my initials"?

A. This, for example (indicating).

Q. Referring to the third belt in the group of three which are attached, a slip there which says— [76]

A. "Q and A statement of Jack"—is that "Jack" it says? "Touren."

Q. Is that in your handwriting, that statement?

(Testimony of Oral Kenneth Chandler.)

A. Yes.

Q. And the date on here, May 10, 1951——

A. Yes.

Q. ——is that in your handwriting?

A. That's right.

Q. Does the name Jack Touren refresh your recollection as to anything with regard to the Sigurdson case?

A. Yes. His name is another one which I hadn't recalled until we just saw it now.

Q. What do you recall about it?

A. I don't know that I should discuss that matter as it may involve confidential information at this point. The court can determine.

The Court: Did it relate to the Sigurdson case?

The Witness: Yes.

Q. (By Miss Martin): Let me ask you this question: Referring to the second belt in this group of three, is there any handwriting on the card which is attached to that belt which is yours? Does the card pull out?

You can pull it out if you want to look at it.

A. There doesn't appear to be a slip on it.

The Court: Keep your voice up. I can't hear you. [77]

The Witness: There doesn't appear to be a slip on either of the other two belts.

Q. (By Miss Martin): Is there anything on the other two belts which refresh your recollection as to whether you ever saw them before?

(Testimony of Oral Kenneth Chandler.)

A. No. Without a playback of the belt itself, I could not so state.

Miss Martin: That's all.

Redirect Examination

By Mr. Tobin:

Q. And you know nothing about the two top belts, is that right, Mr. Chandler?

A. I cannot at this time say what they contain.

Q. You can't identify these? A. No.

Q. That is what I mean. And then the statement is appended to the third belt in order, and that contains the statement which you read to the court; is that right? A. That's correct.

Q. I believe you said your initials——

A. Yes. Do you see that right there (indicating)? "OKC"?

Q. Is that what that is?

A. That is what it is intended to be. And the date, [78] and the number—this would be roll No. 1.

Q. What do you mean by that?

A. This is the number of the roll. In the event that there would be more than one roll, you would number the rolls consecutively.

Q. In consecutive order? A. Yes.

Q. And there doesn't appear to be any roll number or any other marking to identify these other documents?

A. There is nothing there that I saw that would assist me.

(Testimony of Oral Kenneth Chandler.)

Q. But this Jack Touren deal you recall, and those are your initials? A. That's right.

Mr. Tobin: That is all.

Miss Martin: I have one additional question, your Honor.

Recross-Examination

By Miss Martin:

Q. Did you at any time in the Sigurdson investigation take on a Dictaphone belt the statement of a witness Kerr, K-e-r-r? A. I did.

Miss Martin: That's all.

The Court: We will recess until 2:00 p.m. [79]

Miss Martin: Your Honor, may Mr. Kearney be excused?

The Court: Yes, he may be. All of these witnesses may be excused. I am referring to the witnesses who have already testified.

Miss Martin: That's right, your Honor.

(Whereupon, at 12:05 o'clock p.m. a recess was taken to 2:00 o'clock p.m.) [80]

Tuesday, May 14, 1957, 2:00 P.M.

The Court: You may proceed.

Mr. Tobin: Mr. Habell, please.

PHILLIP F. HABELL

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated and give us your full name, please.

The Witness: Phillip F. Habell, H-a-b-e-l-l.

Direct Examination

By Mr. Tobin:

Q. Mr. Habell, you are an Immigration officer and were so on November 2, 1950?

A. Yes, sir.

Q. You were the officer in charge of the investigation and took a statement from Miss Sigurdson at a preliminary hearing on November 2, 1950?

A. Yes, sir.

Q. How many belts did you use at that time?

A. Five.

Q. Five? [81] A. Yes, sir.

Q. Did you ever testify before the Hearing Officer Kearney that you didn't know how many belts were used?

A. I don't recall at this time.

Q. All right.

Now, Mr. Habell, how many transcripts were made of that proceedings?

Miss Martin: I object to that, your Honor, on the ground it is immaterial. The transcript, which is contained in Exhibit A, the certified Immigration

(Testimony of Phillip F. Habell.)

file in evidence in this case is conceded to be a correct transcript.

The Court: Sustained.

Mr. Tobin: May I have the transcript, I believe it is Plaintiff's 1 for identification, the transcript furnished this morning?

Q. (By Mr. Tobin): I show you Plaintiff's 1 for identification, Mr. Habell, and ask you to take a look at it and see if that means anything to you. Can you please tell us, Mr. Habell, whether Plaintiff's 1 for identification is a transcript that you presented to Miss Sigurdson subsequent to the hearing on November 2nd?

A. I am unable to state at this time whether or not this is a copy of the transcript that I presented to her.

Q. Are you able to state that the copy of the transcript that is in Exhibit 7 of the administrative hearing was [82] ever presented to Miss Sigurdson by you?

Miss Martin: I object to that, your Honor. There isn't any transcript in any Exhibit 7. There isn't any Exhibit 7 that I know of.

Mr. Tobin: Exhibit 7 in Exhibit 2 of the hearing. Exhibit 7 is the transcript that is part of the official record. It is marked as Exhibit 7 in the administrative record.

Miss Martin: Do you mean Exhibit A in evidence?

Mr. Tobin: In Exhibit A, that's right. Exhibit 7 of Exhibit A.

(Testimony of Phillip F. Habell.)

Miss Martin: I believe Exhibit 7, your Honor, is the envelope containing the belts.

Mr. Tobin: The belts were just attached to the exhibit.

Miss Martin: The notation Exhibit 7 is on an envelope. It isn't on any statement that I know of.

Mr. Tobin: Well, it doesn't matter. I think the record will substantiate me on that, your Honor.

Miss Martin: All I want to do is object to the question until it is understandable.

The Court: What is the purpose of this? Are you trying to impeach that record?

Mr. Tobin: Yes, your Honor, I am trying to show that the record is not complete, and I am trying to find out from this witness whether the transcript in the administrative record was ever presented to her, to the plaintiff, for her signature, [83] and whether that is the same transcript that was presented to her on November 8th or 10th, as well as on the 14th. That is what I am trying to bring out.

Miss Martin: On the question of whether she ever signed it or not, the record speaks for itself.

The Court: In addition to that, whether the record speaks for itself, don't you see you are now going into this record, which was a part of the previous proceeding? In the first place, the record which is Exhibit 1 here—is that Exhibit 1?

The Clerk: Exhibit A.

The Court: The record which is Exhibit A is the record which was before the hearing officer and

(Testimony of Phillip F. Habell.)

the Board of Immigration Appeals at the time of the proceeding before the Immigration Service, and it is the record that was before the court at the time of the judicial review, and it is the record that was before the Court of Appeals at the time of the appeal from the judgment on the judicial review.

Mr. Tobin: That's right, your Honor, but what I am trying to show at this proceeding, if the court please, is that there were other transcripts, and when the court reviews the transcript of the administrative hearing the court will notice that the hearing officer said at one time, "What difference does it make whether there were other transcripts if the transcript that we now have is accurate?" [84]

The point that I have been trying to convey all these years, your Honor, and I have been unsuccessful so far, is that there were eight belts presented, when only five were required to make the transcript. When there is testimony in the administrative record that that is not the same transcript that was presented to the alien and her counsel on two different occasions, then there is room for investigation, that is the thing that I am trying to convey, your Honor. I am trying to bring it out.

Miss Martin: I will object on the ground that it is immaterial on that point, your Honor, because I don't find——

The Court: The objection is sustained.

Q. (By Mr. Tobin): Mr. Habell, can you tell us what Exhibit 1 is? I beg your pardon. Exhibit 1 for identification, what that is?

(Testimony of Phillip F. Habell.)

A. It appears to me to be a recording, or I should say the typewritten record of the statement made to me by Miss Sigurdson, with my corrections placed thereon in order to make the stenographic typewritten form correspond to what was actually said.

Q. Is this transcript exactly like the transcript that was introduced in the administrative hearing?

Miss Martin: I object to that on the ground it is immaterial, incompetent, and not within the knowledge of this witness. [85]

The Court: The objection is sustained.

Q. (By Mr. Tobin): Was this transcript, Exhibit 1 for identification, made from the belts that were used on November 2nd, Mr. Habell?

A. Yes.

Mr. Tobin: At this time we offer into evidence a copy of the transcript with the interlineations, corrections, by the witness, as a plaintiff's exhibit.

Miss Martin: I object to it on the ground it is incompetent, irrelevant and immaterial. The transcript of the plaintiff's statement, which is in the administrative file, is the part of the record that is contained in Exhibit A here, and this is immaterial.

The Court: Sustained.

Q. (By Mr. Tobin): I show you here—this has already been admitted. I am sorry.

Miss Martin: I think you are in error, counsel. I think it is marked Exhibit 2 for identification.

The Clerk: It is marked for identification.

Mr. Tobin: I am sorry.

(Testimony of Phillip F. Habell.)

Q. I show you here a nine-page document. Will you please take a look at it, Mr. Habell?

A. I have taken a look. Do you want me to read it all?

Q. Do you recall what it was? Now, you don't have to read it. Do you remember having received that or seen that before? [86]

A. This one, particularly, I don't know. I recall that something similar to this was presented to me by you.

Q. Did it bear the verified signature of Halldora Kristin Sigurdson, the one that was presented to you?

Miss Martin: I object on the ground it is immaterial.

The Court: Sustained.

Mr. Tobin: At this time I offer Exhibit No. 2 for identification into evidence as Plaintiff's Exhibit 2, and may I point out to the court that this is the document that was brought by the District Director this morning, and when the court has an opportunity to read the transcript of the administrative hearing it will see that this was adopted as part and parcel of the argument of counsel in a motion to dismiss the entire proceedings, and it was never made a part of the record, and this is one of the documents that plaintiff has objected to, and it was not part of the habeas corpus proceeding and we would like to have it part of this?

Miss Martin: I would object on the ground that this is immaterial because this is not a part of the

(Testimony of Phillip F. Habell.)

hearing record, unless counsel can show me somewhere in Exhibit A, the administrative file, that there is some reference to this document, so that it should be made a part of the record. It never was attached as an exhibit, and there is no reference to it that I know of. [87]

The Court: The objection is sustained.

I don't know whether counsel doesn't understand my rulings, or whether he just deliberately keeps going over the same thing.

As I have stated before, even if there hadn't been a judicial review before, if there had been no habeas corpus proceeding at which time you have a judicial review, if there had been no appeal, if we had nothing before us except the question of a judicial review—in other words, if this court were judicially reviewing the procedure—even then this would not be properly before this court, because it wasn't before the hearing officer, and it is not a part of the record that was being reviewed.

Now, of course, if it were a matter of something that had been offered and improperly rejected, then, of course, that would be considered by this court, but that would be shown in the record. In other words, if you offered it in evidence in the administrative hearing, and it was rejected, then this court might consider it. However, even assuming that that situation existed, that it had been offered in evidence, and that the hearing officer rejected it, still insofar as this proceeding here today is concerned, this court couldn't consider it because, of

(Testimony of Phillip F. Habell.)

course, it would merely mean that you were rehashing the prior judicial review, and that is something that I indicated before cannot be done. [88]

Mr. Tobin: I appreciate the court granting me the privilege of presenting evidence for the record, I appreciate that, and I understand the court's permission, but I would like, if I may, to call the attention of the court to 151.3, subdivision (a) of 8 C.F.R., which says that testimony and exhibits together with all written motions and other papers and requests filed in the proceedings shall constitute the record in this case.

Now, if the court please, I objected before the Board of Immigration Appeals because this document, amongst others, was missing. I contended that this section of the C.F.R. says it should have been there. It wasn't.

The Court: Mr. Tobin, I don't want to argue with you. You just proceed and I will rule because you just cannot understand me.

I tried my best to make it as clear as possible, but you just cannot understand me.

The thing is so clear. If in my personal opinion as I sit here now I thought the hearing officer was wrong, and the Board of Immigration Appeals was wrong, I am bound by the previous hearing, the judicial review that has already been had, and the decision of the Court of Appeals. I realize that you have asked me, you were very clear and frank about it, that you have asked me this morning that you expected me to reverse the Court of Appeals. But

(Testimony of Phillip F. Habell.)

I cannot reverse the Court of Appeals. [89] That is my position, that I can't reverse the Court of Appeals. They went through this whole thing. I don't doubt but what you have read their opinion many, many times.

Mr. Tobin: I have it right now.

The Court: The judge even went through and referred to all of this evidentiary matter, and this clicking that you wanted to put the man on the stand for. He went into all of that. And I just take the position that I may not reverse the court.

You cannot change that record. That is why I have been permitting you here to mark these for identification. Rather than sit here and argue and fight with me, if I am wrong you will have them marked for identification and they may be before the Court of Appeals, and at that time you can point out to the Court of Appeals that you tried to supplement a record which was before the Board of Immigration Appeals, and you tried to supplement a record that was before the court before on a judicial review, and you tried to supplement a record that was before the Court of Appeals, and that I would not permit you to supplement the record, you merely had them marked for identification.

Mr. Tobin: Cross-examine.

Miss Martin: No questions.

The Court: You may step down.

Mr. Tobin: Miss Sigurdson, would you please take the [90] stand?

HALLDORA KRISTIN SIGURDSON

called as a witness herein by and on her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated and give us your full name, please?

The Witness: Halldora, H-a-l-l-d-o-r-a, Kristin, K-r-i-s-t-i-n, Sigurdson, S-i-g-u-r-d-s-o-n.

Direct Examination

By Mr. Tobin:

Q. Miss Sigurdson, you are the plaintiff and the alien in this matter? A. Yes.

Q. You were present at the preliminary hearing on November 2, 1950, in Room 227 of the Immigration Service office? A. I was.

Q. Was this statement recorded on a Dictaphone belt? A. It was.

Q. Do you know how many Dictaphone belts there were?

A. No; I do not know the specific number, but I do know there were many belts.

Q. You heard the statement that there were five belts; [91] can you tell the court whether in your opinion that is accurate, whether there was five belts or whether there was more than five belts used?

Miss Martin: I object to that question as incompetent and irrelevant, and her opinion is immaterial.

(Testimony of Halldora Kristin Sigurdson.)

The Court: Sustained. You know better than that.

Q. (By Mr. Tobin): Miss Sigurdson, approximately how many belts were used?

Miss Martin: I object to that on the ground it has been asked and answered; and also it is immaterial.

The Court: Sustained.

Q. (By Mr. Tobin): Miss Sigurdson, did you have control of that machine that morning?

Miss Martin: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Tobin: It is preliminary to the next thing.

Q. Would you tell the court how many times you saw Mr. Habell or Mr. Chandler change the belts?

A. It could have been a dozen times; it could have been more.

Q. I beg your pardon?

A. It could have been a dozen times; it could have been more.

Q. It could have been a dozen times or it could have [92] been more.

I ask the court's indulgence on this.

How many transcripts were presented to you for inspection as so-called transcripts of the Dictaphone belts of that hearing?

Miss Martin: I object on the ground it is immaterial.

The Court: All right.

Q. (By Mr. Tobin): Now, Miss Sigurdson, you

(Testimony of Halldora Kristin Sigurdson.)

were present at the hearing before Hearing Officer Kearney, and did you see anybody count any Dictaphone belts in open sight at that hearing?

A. Yes.

Miss Martin: I object. It is immaterial.

The Court: Sustained.

Q. (By Mr. Tobin): How many belts were counted?

Miss Martin: I object——

The Witness: Eight.

Miss Martin: Will the witness please refrain from answering until I have had a chance to object to the question?

I object on the ground it is immaterial.

The Court: Sustained.

I suggest that you make a motion to strike the testimony.

Miss Martin: I move to strike the answers to the last two questions for the purpose of making the objection to the [93] questions on the ground that they are immaterial.

The Court: Granted.

Q. (By Mr. Tobin): Miss Sigurdson, did you see anybody hand the Dictaphone belts to Hearing Officer Kearney?

Miss Martin: I object on the same grounds; immaterial.

The Court: Sustained.

Q. (By Mr. Tobin): Do you know or can you tell us whether any belts—first I will ask you this: Did you see those belts removed from an envelope?

(Testimony of Halldora Kristin Sigurdson.)

Miss Martin: Objected to as immaterial.

The Court: Objection sustained.

Do you have any offer of proof?

Does she have the belts?

Mr. Tobin: No.

Q. Do you have any of those belts, Miss Sigurdson?
A. No; I do not.

Q. Did you ever have any?

A. No; I did not.

Q. Did you ever even as much as touch them, to the best of your knowledge?

A. No; I never did.

Mr. Tobin: At this time I make the offer of proof, your Honor, that the witness would testify that she saw Examining Officer Nolan take all of the belts that were in the envelope, which he had previously counted, at the hearing, to the [94] number of eight, and hand all of those belts to Hearing Officer Kearney as the belts of the preliminary hearing of November 2nd.

Miss Martin: I object on the ground it is immaterial.

The Court: Sustained.

Mr. Tobin: That's all.

Miss Martin: No questions.

The Court: You may step down.

Mr. Tobin: Pardon me. May I ask one more question?

Q. When those belts were played at the hearing, did anybody express—did anybody from the Immigration Service, whether it be Hearing Officer

(Testimony of Halldora Kristin Sigurdson.)

Kearney or Examiner Nolan—as to the number of clicks that were heard at that time?

Miss Martin: Objected to as immaterial.

The Court: Sustained.

Q. (By Mr. Tobin): Did you testify on the record based upon what you had been told at that hearing as to the number of clicks that were heard when the instrument was played?

Miss Martin: Objected to as immaterial, and Exhibit A is the best evidence.

The Court: Sustained.

Mr. Tobin: That is all, your Honor.

The Court: You may step down.

Mr. Tobin: Plaintiff rests, your Honor.

Miss Martin: Your Honor, in the previous habeas corpus [95] proceeding there was an Exhibit D, which we had some difficulty—A in Exhibit A, which we had some difficulty in locating, and the clerk advises me that the warrant of deportation contained in the Immigration file, which is now Exhibit A in this case, was marked Exhibit A in the previous habeas corpus case. I just want the record to be clear on that, so that the record will not have any doubt but what we have here all of the exhibits that were in the previous habeas corpus case. We so far hadn't spoken about Exhibit A from the habeas corpus case, but that was the warrant of deportation, which was so marked in the other case. Since it is already contained in Exhibit A in this case, I see no reason to remark it in this case.

The Court: It is in evidence now in this case?

Miss Martin: In Exhibit A, so I see no reason to mark it separately.

The Court: Are all of the exhibits that were in the habeas corpus proceedings all in evidence here now?

Miss Martin: We have covered Exhibits A, B and C.

The Clerk: There is one other exhibit. D, your Honor.

The Court: Is that the one that was just marked for identification, that other brown envelope?

Mr. Tobin: No. That was C in the other action, your Honor. It is B here.

Miss Martin: I am now referring to Exhibit D in the [96] habeas corpus action 15648, which was a carbon copy of a matter dated June 12, 1953, which appears to be a decision of the Chairman of the Board of Immigration Appeals, and I ask that the clerk mark that Government's next in order for this action.

The Court: Was that in evidence?

The Clerk: It was only for identification in the habeas corpus action.

The Court: Then it will just be marked for identification here.

Miss Martin: And it will be Government's Exhibit C, for identification, in this action.

(The exhibit referred to was marked as Government's Exhibit C for identification.)

Miss Martin: As far as I can ascertain, that

brings into this action all of the exhibits, either for identification or in evidence, in the previous habeas corpus action, and all the pleadings and files from the previous habeas corpus matter.

The Clerk: Your Honor, may we check further with reference to the minutes in this case, to make sure that that is the exhibit? That is the only method I have of checking the record to find out what Exhibit A actually was.

Miss Martin: The only reference in the previous habeas corpus action to what Exhibit A was, and the question arises because we had Exhibits B, C and D, so we assume there must [97] have been an Exhibit A, is contained in the return to the order to show cause, in answer to the petition for a writ of habeas corpus, which was filed June 29, 1953, and on page 2 thereof in paragraph 3 it refers to the warrant of deportation attached to that document as Exhibit A, and as far as we can tell from the records, then, that apparently also became Exhibit A for identification and was given that number.

If that is not so, then there was nothing marked as Exhibit A in the previous action. Unless you have something further, Mr. Clerk.

The Clerk: That is all I can find, your Honor.

Miss Martin: The government rests, your Honor.

The Court: Argument?

Mr. Tobin: Would the court prefer to have an oral argument, or would it want the matter to be submitted on briefs?

In view of the fact that the court's position has been as it is, and the plaintiff takes an entirely

different attitude, I think it might be advisable, if it meets with the court's pleasure, to file points and authorities on it, so there would be no question of misstatement or misunderstanding.

I am prepared to make some type of an argument, such as it is.

The Court: If you prefer that, it is all right.

Mr. Tobin: Whatever meets with the court's pleasure. [98] I would be grateful——

The Court: The court will take it under submission, and you may file a memorandum of points and authorities.

You will have 15, 15 and 15.

Mr. Tobin: Good.

The Court: 15, 15 and 5, rather.

Mr. Tobin: That is okay.

The Court: 15 days for the plaintiff and 15 days for the defendant, and then 5 days for the plaintiff.

I will take it under submission. [99]

Certificate

I hereby certify that I am a duly appointed, qualified, and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of November, 1957.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed November 12, 1957. [100]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal in the above-entitled case:

A. The foregoing pages numbered 1 to 52, inclusive, containing the original:

Complaint for Declaratory Judgment and Injunction.

Order to Show Cause and Temporary Restraining Order.

Certified Copy of Order of Court of Appeals for Ninth Circuit re Order Submitting and Granting Motion for Restraining Order re Deportation of Appellant.

Answer to Complaint.

Notice of and Motion for Order of Court Transferring to This Action the Record, Findings, Judgment and Proceedings in Habeas Corpus Action in This Court, in the Matter of Hall-dora Kristin Sigurdson, No. 15648-C, etc.

Points and Authorities in Support of Objections to Motion of the Defendant Del Guercio, filed 2/19/57.

Objections to Points Set Forth in Motion of Defendant Del Guercio, filed 2/19/57.

Minute Order of Court, 3/25/57.

Order Granting Motion to Transfer to This Action the Records and Entire Proceedings in the Matter of Halldora Sigurdson, No. 15648-C, etc.

(Copy) for Subpoena Duces Tecum, Directed to Albert Del Guercio.

Minute Order of Court, 5/14/57.

Memorandum of Decision.

Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Statement of Points on Appeal.

Defendant's Counter Designation of Contents of Record on Appeal.

Order Extending Time to File and Docket Record on Appeal.

B. The foregoing pages, numbered 1 to 119, inclusive, containing the original documents filed in Case No. 15648-C, in the Matter of Halldora Kristin Sigurdson, for Writ of Habeas Corpus, ordered transferred to and made part of Case No. 18089-WM:

Petition for Writ of Habeas Corpus.

Order to Show Cause.

Notice of Intention to File Petition for Writ of Habeas Corpus.

Return to Order to Show Cause and Answer to Petition for Writ of Habeas Corpus.

Respondent's Memorandum of Points and Authorities.

(Copy) Minute Order of Court, 6/30/53.

Traverse to Return to Order to Show Cause and Answer to Petition for Writ of Habeas Corpus.

Notice of Failure to Comply With Order to Show Cause and Order Made in Open Court and Demand for Compliance of Same.

Affidavit in Support of Motion to Withdraw Document From Exhibit B of Respondent's Return to Order to Show Cause on File Herein.

Order to Withdraw Document From Exhibit B of Respondent's Return to Order to Show Cause on File Herein.

Petitioner's Points and Authorities Opposing Respondent's Memorandum.

Order for Release on Bond.

Affidavit in Support of Motion for Release on Bond of Petitioner.

(Copy) Minute Order of Court, 7/13/53.

Subpoena Duces Tecum Directed to District Director, Immigration and Naturalization at Los Angeles.

Motion of United States for and Order to Quash Subpoena Duces Tecum Served on "District Director of 16th District at Los Angeles, etc."

Affidavit of H. R. Landon in Support of Motion to Quash Subpoena Duces Tecum.

Subpoena Duces Tecum Directed to Federal Bureau of Investigation.

Motion of United States for an Order to Quash Subpoena Duces Tecum Served on "District Director of Los Angeles, Office of Federal Bureau of Investigation."

Affidavit of John F. Malone, Special Agent in Charge, Federal Bureau of Investigation.

Points and Authorities in Support of Motion to Quash Subpoenas Duces Tecum.

Notice of Motion for Rehearing of Decision Denying Petition for Writ of Habeas Corpus, etc.

(Copy) Minute Order of Court, 7/14/53.

Findings of Fact, and Conclusions of Law.

(Copy) Judgment, Lodged 7/14/53.

(Copy) Minute Order of Court, 7/15/53.

Objections to Amended Findings of Fact, etc.

Findings of Fact, and Conclusions of Law, filed 7/28/53.

Judgment, entered 7/28/53.

Notice of Appeal, filed 7/30/53.

Order Restraining Respondents From Removing Petitioner From Jurisdiction Pending Final Adjudication of Her Appeal.

Notice of Motion for Bail on Appeal.

(Copy) Minute Order of Court, 8/10/53.

Order Denying Motion for Bail.

Notice of Appeal to United States Court of Appeals From Order Denying Bail on Appeal.

Stipulation as to Designation of Contents of Record on Appeal From Order Denying Release on Bond on Appeal.

Order Extending Time to File Record on Appeal and Docket the Cause.

(Copy) Order Court of Appeals for Ninth Circuit, re Admitting Appellant to Bail Pending Appeal.

(Copy) Minute Order of Court, 3/2/54.

Mandate Court of Appeals for Ninth Circuit, dated 2/27/54, re: Reversal of District Court Denying Appellant's Motion for Bail Pending Appeal, etc.

Mandate Court of Appeals for Ninth Circuit, Dated 3/28/55, re: Affirming Judgment District Court.

C. Plaintiff's Exhibits 1 and 2. Defendant's Exhibits A, B and C.

D. One volume of Reporter's Official Transcript of Proceedings had on:

May 14, 1957.

E. (Filed in Case No. 15648-C) Two volumes of Reporter's Official Transcript of Proceedings had on:

June 30, 1953; July 13, 14, 15 and August 10, 1953.

I further certify that my fee for preparing the foregoing record, amounting to \$3.20, has been paid by the appellant.

Witness my hand and the seal of said District Court on this 14th day of November, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15790. United States Court of Appeals for the Ninth Circuit. Halldora Kristin Sigurdson, Appellant, vs. Albert Del Guercio, etc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 15, 1957.

Docketed: November 18, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15790

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

STIPULATION THAT EXHIBITS MAY BE
CONSIDERED IN THEIR ORIGINAL
FORM

It is hereby stipulated by and between the above-named parties, through their respective counsel of record, that the exhibits may be considered in their original form without the necessity of reproducing them in the printed record.

Dated at Los Angeles this 20th day of November, 1957.

/s/ JOHN P. TOBIN,

Attorney for Appellant.

LAUGHLIN WATERS,

U. S. Attorney;

/s/ ARLINE MARTIN,

Assistant U. S. Attorney,
Attorneys for Appellee.

[Endorsed]: Filed November 22, 1957.

[Title of Court of Appeals and Cause.]

APPLICATION FOR ORDER THAT CLERK'S
TRANSCRIPT IN APPEAL No. 13974 BE
CONSIDERED IN ITS ORIGINAL FORM
AS PART OF THE RECORD ON THIS
APPEAL; AND ORDER THEREON

The District Court number of the present appeal was No. 18089-WB. A prior action for habeas corpus was numbered 15648-C and became on appeal No. 13974. In that latter appeal there was a one-volume Clerk's Transcript in typewritten form.

At the trial of the present case in the District Court, the file and pleadings in the District Court Action No. 15648-C were made a part of the file and proceedings in Action No. 18089-WB, and, therefore, are properly a part of the Clerk's Transcript on Appeal.

There is only one typewritten copy of the one-volume Clerk's Transcript in Appeal 13974 available. However, it would cost the Government Approximately \$400.00 to have this reprinted on the present appeal. While it is a necessary part of the record on appeal, it appears that the present one copy of the one-volume Clerk's Transcript in Appeal 13974 contains all that is necessary, and if considered by this Court in its original form would result in a saving to the Government of \$400.00.

Appellee therefore moves this Court for its order that the one copy of the one-volume Clerk's Tran-

script in Appeal 13974 be considered in its original form as a part of the Transcript of Record in the present appeal for the reasons above indicated.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

ARLINE MARTIN,
Assistant U. S. Attorney;

/s/ ARLINE MARTIN,
Attorneys for Appellee.

ORDER

Good cause appearing therefor, It Is Hereby Ordered that the one typewritten copy of the Clerk's Transcript in Appeal 13974 be marked as a part of the Transcript of Record in the present action and be considered by this Court in its original form.

Dated: January 16th, 1958.

/s/ STANLEY W. DAWES,
Judge, Circuit Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: Filed January 17, 1958.

No. 15,792

IN THE

United States Court of Appeals
For the Ninth Circuit

FORREST SILVA TUCKER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

422 Post Office Building,

San Francisco 1, California,

Attorneys for Appellee.

FILED

JAN 28 1938

PAUL P. O'BRIEN, CL

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No. 15,792

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FORREST SILVA TUCKER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231, and Title 38 United States Code, Sections 1291 and 1294, and it would appear that Title 28 United States Code, Section 2255, and Rule 35 of the Federal Rules of Criminal Procedure may be involved.

STATEMENT OF THE CASE.

Appellant, upon an indictment which charged one count, was tried by jury for violation of 2113(a) and 2113(d) of Title 18 United States Code. The judgment of conviction was entered on May 22, 1953 and sentenced the defendant to a term of 25 years. Ap-

peal was taken from the judgment of conviction to this Court. The Court of Appeals in the case of *Tucker v. United States*, 214 F. 2d 713 affirmed judgment of conviction.

On September 4, 1957 appellant petitioned the Court to vacate his sentence. (R. 6.) Attorney Joseph Murray was appointed by the Court to represent appellant in this proceeding. (R. 25.) On September 25, 1957 the Court, after hearing argument by appellant's counsel and the attorney for the United States, denied the petition. (R. 29.) Thereafter, on October 1, 1957 the Court entered a formal order denying relief under Section 2255 of Title 28 United States Code. Appeal was then made to this Court.

THE OPINION BELOW.

"This case came on regularly for hearing on the Government's objections to hold a hearing pursuant to Section 2255 and on the motion of petitioner, Forrest Tucker, to appear personally at the hearing.

"The court heard argument of counsel, from the government, and from petitioner who was represented by Mr. Joseph Murray who was appointed as his attorney by this court without any objections on the part of petitioner.

"The court being fully advised:

"It Is Ordered that petitioner's motion to appear personally to argue his case is denied, and since the motion and the files and records of the case conclusively show that the prisoner is

entitled to no relief, the motion to revoke sentence under Section 2255 of Title 28 United States Code, is denied.

“Dated: October 1, 1957.

“/s/ George B. Harris
United States District Judge”

ARGUMENT.

Appellant argues that his conviction for aggravated bank robbery was not justified by the evidence. It should be pointed out that Section 2255 involves the collateral attack of a judgment. The proper place to urge the question of sufficiency of the evidence is on appeal from a judgment of conviction. In the instant case appellant appealed from his conviction and the judgment below was sustained by the Court of Appeals. The insufficiency of the evidence cannot be considered by the Court in this proceeding.

Appellant's main argument is directed to the proposition that a 25 year sentence in his case was improper. This Court may not consider the length of a sentence which is within the limits allowed by statute.

Flores v. United States, (9th Cir.) 238 F. 2d 758;

Brown v. United States, (9th Cir.) 222 F. 2d 293.

CONCLUSION.

A reading of the transcript clearly reveals that the Court was under no misapprehension as to the defendant's prior record. Aggravated bank robbery, Section 2213(d) of Title 18 United States Code provides for a maximum sentence of 25 years or \$10,000 fine. Appellant's sentence, therefore, was within the maximum provided by law. The sentence is, therefore, beyond the control of this Court.

Dated, San Francisco, California,
January 24, 1958.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.

No. 15801

United States
Court of Appeals
for the Ninth Circuit

GLADYS E. LINCOLN GRAMM,

Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, De-
ceased,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Southern Division.

FILED

DEC 20 1957

PAUL H. HENNINGSEN, CLERK

No. 15801

United States
Court of Appeals
for the Ninth Circuit

GLADYS E. LINCOLN GRAMM,
Appellant,
vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, De-
ceased,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FRANK E. CHALFANT, SR.,
509 Idaho Building,
Boise, Idaho;

RAYMOND L. GIVENS,
1530 Idaho Street,
Boise, Idaho,

Attorneys for Appellant.

KARL PAINE,
Idaho Building,
Boise, Idaho;

J. M. LEGGAT,
Idaho Building,
Boise, Idaho,

Attorneys for Appellee.

In the District Court of the United States for the
District of Idaho, Southern Division

Civil Action, File No. 3253

GLADYS E. LINCOLN GRAMM,

Plaintiff,

vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, Deceased,

Defendant.

COMPLAINT

Plaintiff complains of the defendant and for her
cause of action alleges:

I.

That plaintiff is a citizen of the State of California,
and defendant is a citizen of the State of Idaho, and
that the matter in controversy exceeds the sum of
Three Thousand (\$3,000.00) Dollars, exclusive of in-
terests and costs.

II.

That Henry Lincoln died testate at Boise, County
of Ada, State of Idaho, on the 27th day of August,
1955, being at the time of his death, a resident of said
county and state, leaving estate therein consisting en-
tirely of personalty; That, thereafter, such proceed-
ings were had in the Probate Court of Ada County,
State of Idaho, on the 23rd day of September, 1955,
that the last will and testament of the said decedent

was admitted to probate and Elizabeth Lincoln was duly appointed as executrix thereof; that she duly qualified as such executrix and letters testamentary were issued to her; and that she ever since has been and now is the duly qualified and acting executrix of the said last will and testament.

III.

That the said Henry Lincoln, in his lifetime, became indebted to plaintiff, said indebtedness arising out of and under an agreement in writing, made and entered into the 14th day of September, 1938, while the said Henry Lincoln and plaintiff were husband and wife, at Los Angeles, California.

IV.

That the said agreement was fully performed by plaintiff and unperformed by the said decedent who failed to pay during his lifetime, the amounts due thereunder each month, or at all. That the sum of \$25,500.00 thereunder is now due, owing, payable and unpaid, a copy of which agreement is hereto annexed as "Exhibit A," and made a part hereof.

V.

That on or about the 7th day of February, 1956, plaintiff duly presented her duly verified creditor's claim to the said executrix before decree of distribution was made or entered in said estate of Henry Lincoln, deceased, in the said Probate Court.

VI.

That on the 9th day of February, 1956, the said

defendant, as such executrix, rejected plaintiff's said claim, and this action is commenced within three months thereafter as required by Section 15-609 Idaho Code, requiring this action to be so commenced.

VII.

That the said defendant, nevertheless, failed to report to the said Probate Court or to disclose to any judge thereof, the fact of the presentation of the said claim, but instead misrepresented to the court that all debts of decedent and of his said estate had been paid and discharged, and that no such creditor's claim had been presented to executrix, and on the 17th day of February, 1956, the said Probate Court therefore made, entered and recorded its decree of final distribution of the said estate of the said Henry Lincoln, deceased, of the entire estate to said defendant personally.

Wherefore, Plaintiff prays:

1. That the defendant be compelled absolutely to perform the said agreement dated September 14, 1938;
2. That, if absolute performance is not granted, judgment be entered against the defendant for the sum of Twenty Five Thousand and Five Hundred (\$25,500.00) dollars.
3. For such other and further relief as the Court may deem just and meet in the premises, and

4. For plaintiff's costs necessarily incurred in this action.

/s/ FRANK E. CHALFANT, SR.,
Attorney for Plaintiff.

EXHIBIT "A"

Agreement

This Agreement, made and entered into this 14th day of September, 1938, by and between Henry Lincoln, of Los Angeles, California, hereinafter called Party of the First Part, and Gladys E. Lincoln, of Los Angeles, California, hereinafter called Party of the Second Part:

Witnesseth:

Whereas, the parties hereto are husband and wife and unhappy differences have arisen between them; and

Whereas, the parties hereto have separated and are no longer living together, and have decided upon a complete settlement of their respective property rights and the rights of the parties to separate maintenance, alimony, attorney's fees and costs, and in and to their respective legal obligations as husband and wife, and to settle and adjust their respective property rights and relations and all claims and demands which either party now has or may in the future have upon the other; and

Now, Therefore, It Is Hereby Agreed by and between the parties hereto that in consideration of the mutual promises hereinafter contained and the premises aforesaid, said parties do hereby covenant and agree, the other with the other as follows:

One: The Party of the First Part, Henry Lincoln, the husband, hereby agrees to pay Party of the Second Part, Gladys E. Lincoln, his wife, the sum of One Hundred Twenty-five Dollars (\$125.00) per month during the rest of his natural life, payable on the 15th day of each and every month beginning on the 15th day of September, 1938. Said parties have incurred certain obligations which are now outstanding, namely: \$217.00 still due on Zephyr car, payable at the rate of \$31.00 per month, which shall be paid by the Party of the First Part payable \$93.00 on the 15th day of November, 1938, and \$31.00 each month thereafter.

Two: It is further agreed between the parties hereto that the household furniture, furnishings and goods at 12038 Texas Avenue, West Los Angeles, California, shall hereafter be the property of Party of the Second Part and the title thereto is hereby vested in the Party of the Second Part.

Three: It is further understood and agreed that there is no other community property belonging to either of the parties hereto.

Four: It is further mutually understood and agreed that the said parties hereto hereby accept the

considerations moving to each of them under this agreement as a full and complete settlement of all property rights, and each party agrees to accept as a complete settlement of all of his or her right to alimony, maintenance, attorney's fees and costs.

Five: It is further mutually understood and agreed that each party hereto does in consideration of the premises, forever release and absolve the other from all obligations and liabilities from future accounts and debts of the other and each of the parties hereto does hereby release, relinquish, quitclaim and surrender to the other all and every right as to the spouse of the other, in and to any and all present and future claims and demands of every nature on or against the other, or on or against the property of the other, and each of the said parties as the spouse of the other, does hereby release, relinquish and surrender all right, claim and demand in law, to any and all property which the other may hereafter acquire and all right to the same at the death of the other and all rights as the heir of the other, as well as the right to act as administrator or administratrix of the other by reason of the relationship of husband and wife, now existing or which may exist between them at the time of the death of the other party.

Six: It is further agreed and understood that this agreement shall not be construed as affecting the rights of either of the said parties hereto to prosecute and appear and defend in any cause of action

for divorce except insofar as this agreement settles the rights of the respective parties herein.

Seven: It is further agreed and understood that this agreement may be entered as a part of any interlocutory or final decree of divorce that may be granted either of the parties hereto.

Eight: It is mutually understood and agreed by and between the parties hereto that the said parties will, and each of them will, hereafter keep each free and harmless or indemnified from any and all debts and liabilities hereafter to be contracted, and the said Party of the Second Part does hereby covenant and agree that she will incur no indebtedness chargeable to or for which the said Party of the First Part shall become liable, and the said Party of the First Part does hereby covenant and agree that he will incur no indebtedness chargeable to or for which the said Party of the Second Part shall become liable.

Nine: It is mutually agreed by and between the parties hereto that each of them will not do or suffer to be done anything to hinder, molest or disturb the other; and the parties hereto are on honor bound not to annoy or cause any annoyance to the other by reason of their relationship as husband and wife, and from and after this day each of the parties hereto will treat the other, and it is understood to be as though they were never husband and wife.

Ten: It is mutually agreed by and between the parties hereto that all property, real, personal or mixed, hereafter acquired by the parties, and all

earnings which may be made or acquired by the parties, shall be his or her sole and separate property, respectively, free from all claims of the other; that each of the parties hereto shall have the right to dispose of her or his property, both real and personal, which either of them now has or that may be hereafter acquired by either of them, as fully and effectually as if the parties hereto were not married and had never been married and that each of the parties hereto does hereby release and relinquish to the other, and to his or her heirs, executors, administrators or assigns, all claims, demands and interest of the one against the person or estate of the other.

Eleven: That each of the parties hereto does hereby agree that they will now or in the future, execute any instrument that they are called upon to execute as husband and/or wife, to any property of any kind or description, so that the title of said property may remain in or be the property of the party owning or holding same.

Twelve: That this agreement is not made and shall not be construed as an agreement for or in aid of any divorce and that it is to remain in full force and effect whether the parties continue with the relation of husband and wife, or such relations may hereafter be dissolved for any cause whatever.

It is further understood and agreed that the parties hereto have read the covenants and conditions herein contained and have been fully advised by

counsel representing each party hereto and the acts evidenced by their signatures hereto are their own free and voluntary acts.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ HENRY LINCOLN,
Party of the First Part.

/s/ GLADYS E. LINCOLN,
Party of the Second Part.

Duly verified.

[Endorsed]: Filed May 5, 1956.

[Title of District Court and Cause.]

ANSWER

I.

Defendant alleges in answer to paragraph III of the complaint that she is without knowledge or information sufficient to form a belief as to the truth of said allegations.

II.

Answering paragraph IV of the complaint defendant denies that the sum of \$25,500.00 or any other sum is now due, owing, payable, or unpaid under said agreement. Defendant alleges in answer to the other allegations of said paragraph IV that she is

without knowledge or information sufficient to form a belief as to the truth of them.

III.

Defendant denies each and every allegation, statement, and averment contained in paragraph V of the complaint.

IV.

Answering paragraph VII of the complaint defendant admits that on the 17th day of February, 1956, the Probate Court of Ada County, State of Idaho, made, entered, and recorded its decree of final distribution of the estate of Henry Lincoln, deceased, and thereby distributed the entire residue of the estate to the defendant personally, and denies each and every other allegation, statement, and averment contained in said paragraph VII.

V.

And defendant further alleges as a separate answer and defense that another proceeding is pending in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, wherein the plaintiff herein is seeking to recover judgment on the identical claim sued upon in the above-entitled action, to wit: Plaintiff herein, after the Probate Court of Ada County, Idaho, had denied her motion to vacate and set aside the decree of final distribution made and entered in the matter of the estate of Henry Lincoln, deceased, appeal from the said decree of final distribution to the said state district court, which appeal is now pending therein: that

the plaintiff herein is the appellant therein, and the defendant herein is the respondent therein, and the relief sought on said appeal and in the above-entitled action is the same.

VI.

And further answering the complaint, and for a separate answer thereto defendant alleges that as executrix of the last will and testament of Henry Lincoln, deceased, she caused notice to creditors of the deceased to be duly published for four weeks beginning September 29, 1955, and ending October 20, 1955, as provided by the order of the Probate Court of Ada County, State of Idaho, and by the statutes of the State of Idaho, in such case made and provided; that the alleged claim of plaintiff was not presented to defendant within four months after the first publication of said notice, as required by said notice and the applicable law of the State of Idaho, or at all; and plaintiff did not apply to the said Probate Court for an order extending the time for presenting her alleged claim until after the decree of final distribution had been duly made and entered by the said Probate Court in the matter of said estate, and no order was made by the said Probate Court extending the time for presenting said claim; that in the circumstances in this paragraph set forth the alleged claim of plaintiff at the time she alleges in the complaint that she presented it to defendant, to wit, February 7, 1956, had no legal status as a creditor's claim and, under the applicable statutes of Idaho and the decisions of the Idaho Supreme Court

expounding and construing the same, was and is a nullity.

VII.

That on the 17th day of February, 1956, the said Probate Court duly made and entered its order and decree allowing and settling the first and final account of the executrix of the estate of Henry Lincoln, deceased (who is the defendant herein), and making final distribution of the residue of said estate, pursuant to the petition for final distribution filed by the said executrix; that the said order and decree were and are in one instrument; that the time and place of hearing said first and final account and petition for final distribution were duly and regularly noticed by the clerk of said court as provided by law; that plaintiff did not appear in person or by attorney in opposition to the making and entry of said order and decree, or at all, or make or file any objections either orally or in writing to the said account or the petition for final distribution as provided by law or at all; that thereafter on the 16th day of March, 1956, the plaintiff moved the Probate Court "that the said Decree be vacated and set aside as void against your petitioner (plaintiff herein) in the face of the failure of the said executrix (defendant herein) to disclose filing of the said Creditor's Claim by your petitioner (plaintiff herein)," which motion, after arguments of counsel and due deliberation thereon by the Court, was by it denied and overruled on the 11th day of April, 1956.

That the said creditor's claim referred to is the identical creditor's claim which is the subject of this

action, and the parties in the said proceeding in the said Probate Court, and the parties to the above-entitled action are identical; that plaintiff in the above-entitled action was the creditor who made the motion to vacate and set aside said decree in the Probate Court, and the defendant herein was the executrix of the estate of Henry Lincoln, deceased, in said proceeding; that the said order refusing to vacate and set aside the said order and decree is now final and conclusive of plaintiff's right in the premises, and stands unreversed and unmodified and in full force and effect, and the matters and things above set forth, which were determined, adjudged, and decreed in the order refusing to vacate and set aside the said decree of the Probate Court were and are res adjudicata between the plaintiff and the defendant in this cause.

VIII.

The sum of \$19,000.00, part of the claim stated in the complaint, did not accrue within five years before the commencement of this action, and is therefore barred by the provisions of 5-216, Idaho Code.

IX.

That plaintiff's cause of action is barred by the provisions of 15-602, Idaho Code.

X.

That plaintiff's cause of action is barred by the provisions of 15-604, Idaho Code.

Wherefore, defendant demands judgment that plaintiff take nothing by this action, and that de-

fendant have her costs of suit in this behalf expended.

/s/ KARL PAINE,

Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed June 2, 1956.

[Title of District Court and Cause.]

MOTION

Comes now the defendant herein, and moves the court for an order under Rule 7(a) of Federal Rules of Civil Procedure requiring the plaintiff to reply to the answer of defendant to plaintiff's complaint on file herein on the grounds and for the reasons set forth in the affidavit of Karl Paine, marked Exhibit "A," annexed hereto, and made a part hereof.

This motion is based upon the said affidavit and the records and files in this action.

/s/ KARL PAINE,

Residing at Boise, Idaho,

Attorney for Defendant.

EXHIBIT "A"

In the District Court of the United States
for the District of Idaho, Southern Division

GLADYS E. LINCOLN GRAMM,

Plaintiff,

vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, De-
ceased,

Defendant.

AFFIDAVIT

State of Idaho,
County of Ada—ss.

Karl Paine, being duly sworn, says that a reply to the answer of defendant to plaintiff's complaint on file in the above-entitled action will do away with the necessity of a trial, and present only questions of law for decision, and in support of this allegation he avers:

I.

Plaintiff alleges in her complaint that she presented a creditor's claim to defendant as executrix of the last will and testament of Henry Lincoln, deceased, but she does not allege that she presented said claim within the time limited in the notice to creditors for the presentation of creditors' claims, or that she applied to the Probate Court for an order extending the time in which to present her alleged

claim, or that the said court made any order extending the time for presenting her alleged claim.

II.

The answer of defendant to plaintiff's complaint denies that plaintiff presented any claim, and affirmatively alleges that at the time plaintiff lodged her alleged claim with the defendant the time limited in the notice for presenting creditors' claims had expired, and that plaintiff did not apply to the said Probate Court for an order extending the time for presenting her alleged claim, and that the said Probate Court made no order extending the time for the presentation of plaintiff's alleged claim.

III.

And the said answer further alleges that the presentation of the alleged creditor's claim after the time limited in the notice for the presentation of claims, in the absence of an order of the court extending the time therefor, was a nullity.

IV.

And defendant further alleges that paragraphs V, VI, and VII of her said answer are based upon the records and files of said Probate Court in the matter of the estate of Henry Lincoln, deceased, and no dispute exists between the parties, or will arise, as to the truth of them.

And further affiant saith not.

/s/ KARL PAINE.

Subscribed and sworn to before me this 20th day of August, 1956.

[Seal] /s/ BETTY W. WRIGHT,
Notary Public for Idaho,
Residing at Boise, Idaho.

[Endorsed]: Filed August 20, 1956.

[Title of District Court and Cause.]

MINUTE ORDER SEPTEMBER 5, 1956

This cause coming on regularly this date for hearing on Motion to Compel plaintiff to reply to defendant's answer to plaintiff's Complaint, Frank Chalfant, Sr., appeared on behalf of the plaintiff and Karl Paine, Esquire, appeared for defendant.

After hearing counsel and the Court being advised, the Motion was granted and plaintiff was ordered to answer affirmative defense of defendant.

[Title of District Court and Cause.]

REPLY TO AFFIRMATIVE DEFENSE

With reference to the alleged affirmative defense contained in the answer filed herein, plaintiff replies in part as follows, to wit:

I.

That at all times herein mentioned plaintiff was a non-resident of the State of Idaho and was not

within the State of Idaho during the year 1955 nor until September 25, 1956.

II.

That at the time alleged in the said affirmative defense did plaintiff know directly or indirectly of any notice to creditors nor the date when the period for the filing of claims against the said estate commenced or ended, but plaintiff was misled thereon by a proposed settlement as hereinafter alleged.

III.

That on December 29, 1955, plaintiff consulted with a California attorney, Joseph Shane, regarding the matter of filing her creditor's claim in the estate of Henry Lincoln, deceased; that on said date plaintiff's said attorney communicated with the clerk of the Probate Court of Ada County, State of Idaho, inquiring about the pendency of said estate; that thereafter, about January 3, 1956, plaintiff first learned that the estate of Henry Lincoln, deceased, was being probated.

IV.

That thereafter, on or about February 4, 1956, plaintiff did locate her copy of the property settlement agreement which is the subject matter of this action, caused the same to be photostated and appended to her creditor's claim, and on or about February 6, 1956, duly presented her creditor's claim to the defendant.

V.

That in connection with such presentation of her

creditor's claim, plaintiff caused a letter to be written by her attorney and presented with the said claim, in which letter plaintiff stated, among other things, the following:

"I do not know when the first publication of notice to creditors was made and, consequently, I am unable to determine if this creditor's claim was filed in time. If for some reason the same should be rejected because of the time of presentation, please advise me thereof at once so that an affidavit by my client can be made and presented to the Probate Judge permitting the filing of this creditor's claim by reason of my client's non-residence in Idaho and lack of knowledge of notice to creditors. Please accept my thanks in advance for your immediate reply to the matter stated herein."

VI.

That thereafter, under date of February 9, 1956, defendant through her attorney, Karl Paine, wrote to plaintiff's said attorney and did acknowledge the receipt of plaintiff's said creditor's claim, stating as follows:

"Reference is made to your letter of February 6, 1956, addressed to Mrs. Elizabeth Lincoln, Executrix of the Estate of Henry Lincoln, deceased, enclosing a creditor's claim against the said estate. Since you mailed the letter in my care it is hardly necessary to say that I am replying thereto as attorney for the estate.

"I note your inquiry. Disclaiming any intended discourtesy to you, either personally or professionally, I am constrained to say that I am in no position to supply the information you seek, or to aid or appear to aid you in the presentation or prosecution of this claim. On the other hand it is my present duty and earnest purpose to do all in my poor power to defeat the claim, which on its face is phony. Mrs. Lincoln has heard of "Connie," and of the bad time she gave Mr. Lincoln in the long ago, but your letter is the first information she has had of this or any other claim of your client against Mr. Lincoln.

"Do not misunderstand me. This harsh characterization of the claim is not meant to strike at you over your client's shoulders. I seek no personal quarrel with you. You may not know anything of the claim's history.

"Lastly, I note that the claim is divided into two parts, obviously because it is thought the first item may be outlawed. In my opinion it is outlawed. If your client will withdraw it, I will entertain an offer of compromise from you based on the second item. Lawsuits are costly."

That defendant's said attorney ignored the inquiry of plaintiff's attorney dated February 6, 1956, wholly failed to disclose the dates of notice to creditors or the fact that the defendant had, on February 8, 1956, filed her petition for distribution and her final account in said estate in the Probate Court of Ada County, Idaho.

VIII.

That the plaintiff and her attorney did so rely upon the said letter of the defendant's attorney that plaintiff and her attorney were thereby induced to and did omit her right of asserting to the Probate Court her said creditor's claim; that the defendant as executrix thus acted for her own personal interest utterly and directly in conflict with her high fiduciary duty as executrix to faithfully protect the legal rights of creditors, and not to prefer or favor herself.

IX.

That defendant is the sole and only beneficiary under the last will and testament of Henry Lincoln, deceased, and the violation of her said fiduciary relationship and trust as aforesaid did so to her personal benefit and to the detriment of plaintiff, and thus resulted in the unjust enrichment of defendant personally.

X.

That the proceedings on appeal referred to in paragraph V of defendant's affirmative defense came on for hearing in the District Court of the Third Judicial District for Ada County, on September 26, 1956, and said court did on said date refuse proffered evidence of the creditor's claim and held in substance that the decree of distribution was affirmed, and therefore, would receive no evidence on the matters alleged in plaintiff's complaint herein or the matters raised in answer to defendant's affirmative defense herein; that an appeal from said judgment of affirmance will be prosecuted by plaintiff.

XI.

That plaintiff has no plain, speedy or adequate remedy at law whereby her rights in the premises may be punctually enforced.

Wherefore, plaintiff prays that she have relief as prayed in her complaint for specific performance of her said property settlement agreement and for general and equitable relief herein.

/s/ FRANK E. CHALFANT, SR.,
Attorney for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed October 12, 1956.

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[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant moves the court for summary judgment herein against the plaintiff and in favor of defendant on the ground, inter alia, that it appears from the pleadings

I.

That plaintiff admits that defendant, as executrix of the estate of Henry Lincoln, deceased, duly caused notice to creditors to be published for the time and in the manner provided by law, pursuant to the Idaho law in such case made and provided and the order of the Probate Court of Ada County, State of Idaho; that the alleged creditor's claim set

forth in plaintiff's complaint was not presented to defendant within the time limited by such notice to creditors or presented at all; that plaintiff lodged with defendant said alleged creditor's claim after the time limited for the presentation of creditor's claims; that plaintiff did not apply to the said Probate Court for an order extending the time for the presentation of said alleged claim until after the decree of final distribution had been made and entered in said estate, and that said Probate Court did not make an order extending the time for the presentation of said alleged or any other creditor's claim;

Wherefore, it appears from the pleadings that the said alleged claim when lodged as aforesaid was not a creditor's claim, but under the applicable law of the State of Idaho and the decisions of the Supreme Court of Idaho said alleged creditor's claim was and is a nullity.

II.

It further appears from the pleadings, *inter alia*, that plaintiff admits that the allegations of paragraph V of defendant's answer are true, and further admits by plaintiff's reply to the answer that the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on September 26, 1956, affirmed the order and decree appealed from, and that plaintiff intends to appeal from the order affirming the same. And defendant alleges that the time for appealing from said order last mentioned has not expired.

Wherefore, it appears from the pleadings that another proceeding is pending in the said state district court wherein plaintiff is seeking to recover judgment on the identical claim sued upon in this action.

III.

It further appears from the pleadings, inter alia, that plaintiff admits that the allegations of paragraph VII of defendant's answer are true.

Wherefore, it appears from the pleadings that the order of the Probate Court refusing to vacate and set aside the order allowing and settling defendant's first and final account and the decree of final distribution made and entered in said estate is now final and conclusive in the premises and stands unreversed and unmodified and in full force and effect, and that no appeal lies therefrom, and that the matters and things which were determined, adjudged, and decreed in the order refusing to vacate and set aside the said order and decree of the Probate Court were and are res judicata between the plaintiff and defendant in this action.

This motion is based upon the pleadings and the records and files in the above-entitled action.

/s/ KARL PAINE,

Residing at Boise, Idaho,
Attorney for Defendant.

NOTICE OF MOTION

To Gladys E. Lincoln Gramm, Plaintiff, and to
Frank E. Chalfant, Sr., Attorney for Plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before this court in the courtroom of said court in Boise, Idaho, on the 25th day of October, 1956, at 10:00 o'clock a.m. of that day, or as soon thereafter as counsel can be heard.

/s/ KARL PAINE,
Residing at Boise, Idaho,
Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed October 15, 1956.

[Title of District Court and Cause.]

MOTION TO FILE A
SUPPLEMENTAL ANSWER

Comes now the defendant herein and moves the Court for leave to file a supplemental answer herein.

This motion is based upon the records and files in this action and upon a copy of the opinion of the Supreme Court of the State of Idaho affirming the order of the state District Court referred to in defendant's answer on file herein affirming the order of the Probate Court of Ada County allowing and settling the first and final account of defendant as executrix of the estate of Henry Lincoln, deceased.

and the decree of final distribution made and entered therein, from which order of the state District Court an appeal was taken to the Idaho Supreme Court by plaintiff. A copy of said opinion of the Supreme Court is marked Exhibit "A," annexed hereto, and made a part hereof.

/s/ KARL PAINE,
Attorney for Defendant.

[Endorsed]: Filed June 29, 1957.

[Title of District Court and Cause.]

Civil Action 3253

MOTION

Comes Now Plaintiff in the above-entitled action and moves the court for an order that the plaintiff may add, as an additional party in the above proceedings, Elizabeth Lincoln as an individual heir and legatee, and that the plaintiff may file the amended complaint attached hereto and by reference thereto made a part hereof.

/s/ FRANK E. CHALFANT, SR.,
/s/ RAYMOND L. GIVENS,
Attorneys for Plaintiff.

[Endorsed]: Filed July 23, 1957.

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER

Comes now the defendant, by leave of court first had and obtained, and for a supplemental answer to plaintiff's complaint on file herein alleges:

I.

That since the filing of defendant's answer herein the state District Court mentioned in paragraph V of her said answer made a final order herein affirming the decree of final distribution and the order allowing and settling the first and final account of the defendant as the executrix of the estate of Henry Lincoln, deceased, and thereupon plaintiff appealed therefrom to the Supreme Court of the State of Idaho, and on the 31st day of May, 1957, the Supreme Court affirmed the order so appealed from; that more than twenty days have elapsed since the opinion of the Supreme Court was made and filed, and the time for filing a petition for rehearing on said appeal has expired, and no petition for a rehearing therein is pending, and the remittitur to the said District Court has been duly issued by the Supreme Court and filed in the said state District Court, and the said order of the said state court is final and conclusive and in full force and effect and establishes the law of this case in all the courts of this state, state and federal.

The opinion of the Supreme Court is marked Exhibit "A," annexed hereto, and made a part hereof.

Wherefore, defendant repeats the demand in her said answer contained that plaintiff take nothing by this action, and that defendant have and recover her costs of suit herein.

/s/ KARL PAINE,

/s/ J. M. LEGGAT,

Attorneys for Defendant.

Service of copies acknowledged.

EXHIBIT "A"

In the Supreme Court of the State of Idaho

No. 8517

In the Matter of the
Estate of Henry Lincoln, Deceased,

GLADYS E. LINCOLN GRAMM,

Petitioner-Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Will of
Henry Lincoln, Deceased,

Respondent.

Appeal from the District Court of the Third Judicial District, Ada County. Honorable M. Oliver Koelsch, Judge.

From a judgment of the District Court affirming an order of the Probate Court refusing to set aside a settlement of final account and decree of distribution appellant appealed. Affirmed.

FRANK E. CHALFANT, SR.,

Boise, and

JOSEPH SHANE,

Los Angeles,

For Appellant.

KARL PAINE,

Boise,

For Respondent.

Keeton, C. J.

Henry Lincoln died testate August 27, 1955, leaving his widow, Elizabeth Lincoln, respondent, executrix and sole devisee and legatee. His will was admitted to probate September 23, 1955. Time for presentation of claims against the estate expired January 29, 1956. Decree was entered that due and legal notice to creditors had been given. The executrix filed her final account and petition for distribution of the estate.

On or about February 9, 1956, subsequent to the expiration of the time for presentation of claims, but before the decree of distribution was entered, appellant, a former wife of deceased, filed a claim with Karl Paine of Boise, attorney for the estate, he being the person designated in the notice to creditors with whom claims should be filed. This claim was based

on an agreement entered into between appellant and deceased, dated September 14, 1938, in which deceased agreed to pay said appellant the sum of \$125.00 a month "during the rest of his natural life, payable on the 15th day of each and every month, beginning September 15, 1938." The creditor's claim and the testimony show that none of the payments was ever made.

After the time for presentation of claims had expired, but before the decree of distribution had been entered Karl Paine, attorney for the estate, wrote a letter to appellant's attorney Shane, acknowledged receipt of the claim, in substance rejected it, but did not furnish information asked for relative to securing an extension of time in which to file the claim.

The attorney representing appellant was advised, in response to an inquiry, by the probate judge by letter dated January 3, 1956, the name of the executrix and where claims should be filed, and a claim blank furnished.

Appellant filed no objections in the probate court to the first and final account or to the petition for distribution. Decree of final distribution and settlement of final account was made and recorded. Thereafter, on March 16, 1956, appellant filed a petition with the probate court to set aside the decree of distribution on the ground that her claim had never been presented to or passed on by the probate court, nor rejected by the executrix, and no notice of rejection had ever been given, and that it was falsely

represented in the final account and petition that all the debts had been paid and discharged and that the estate was in a condition to be closed.

To this petition the executrix demurred on the ground that the facts alleged were insufficient to grant the relief prayed for and also moved to strike the petition on the ground that at the time the claim was presented the time for presenting claims had expired and no extension of time had been asked for or granted, and that no exceptions or objections were ever taken to the final account and petition for distribution as filed. Thereafter on April 5, 1956, appellant, in writing, asked for an extension of time for filing a creditor's claim on the ground that she was a nonresident of the state and had no actual notice, directly or indirectly, of the publication of notice to creditors. In her affidavit appellant states that she learned of the final burial services of deceased about December 17th and on December 29th contacted Joseph Shane, an attorney of Los Angeles, relative to the presentation of a creditor's claim against the deceased's estate.

On April 11, 1956, the probate judge sustained the demurrer to the petition and granted the motion to strike the same, and dismissed the matter with prejudice. On April 12, 1956, claimant filed notice of appeal to the district court "from the Decree of Settlement of Final Account * * * of the last will and testament of Henry Lincoln, deceased" and "from the Decree Directing the Distribution made and entered the 17th day of February, 1956." No appeal

was taken from the order denying the petition to vacate the decree of final distribution.

On appeal the matter was heard by the Honorable M. Oliver Koelsch, district judge, who found that the claim was not presented to the executrix within the time limited by the notice to creditors, that no exceptions or objections, either oral or in writing, were taken in the probate court to the first and final account or to the petition for final distribution; that the only appearance by appellant in the probate court was after the decree of final distribution had been made and entered; that the proceeding in the probate court in the matter was free of error, and was regular, legal and valid in all respects and affirmed the decree of the probate judge. Appeal was taken from the judgment to this Court.

Appellant assigns as error the alleged failure of the district judge to make findings of fact and conclusions of law; in rejecting the offer in evidence of appellant's claim; that the probate judge did not require high fiduciary standards of duty applicable to representatives administering estates of deceased persons; that the claim was not rejected in writing by the executrix in the manner provided by Sec. 15-607 I.C.; that the decree of distribution did not mention or refer to appellant's claim; that the decree of distribution should not have been entered and the final account approved without a report having been made by the executrix of appellant's claim; that the executrix was guilty of bad faith in that the claim should have been reported to the probate

judge before the account was settled; that an extension of time should have been granted after the time for presentation of claims had expired to present the particular claim in question. Other assignments are covered in the ones above enumerated.

The material facts are not in dispute. Findings of fact and conclusions of law were entered in the district court. Further findings than those made were not required.

The attorney for the estate, Karl Paine, was not contacted relative to the claim until after the time for presentation of claims had expired.

Sec. 15-604 I.C. provides:

“All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever: provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or a judge thereof, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.”

This section requires that claims against an estate be presented within the time and in the manner prescribed by law.

If an extension of time for filing claims is to be secured, an affidavit and showing “may be presented at any time before a decree of distribution is en-

tered." Neither the affidavit mentioned in the section, nor claim was presented in this case within the time prescribed.

Probate courts are courts of record with original jurisdiction in all matters of probate and settlement of estates of deceased persons, Idaho Const., Art. V, Sec. 21, and their orders and judgments in regard to such matters cannot be collaterally attacked and can be reviewed only by proper motion in such courts or by appeal from their decisions. *Clark vs. Rossier*, 10 Idaho 348, 78 P. 358; *Shaw vs. McDougall*, 56 Idaho 697, 58 P. 2d 463; *Penn Mutual Life Insurance vs. Beauchamp*, 57 Idaho 530, 66 P. 2d 1020.

A party claiming an interest in an estate of a deceased person cannot present his claim and establish his status as such claimant in the first instance on appeal to the district court from a decree of the probate court distributing the estate. *Estate of McVay*, 14 Idaho 64. 93 P. 31; *Shaw vs. McDougall*, *supra*.

In *Lundy vs. Lemp*, 32 Idaho 162, 179 P. 738, it was held that claims against estates of deceased persons, arising upon contracts, which are not presented to the executor or administrator within the time limited in the notice required by law to be given to creditors are barred and no action can be maintained thereon. To the same effect see *Blake vs. Lemp*, 32 Idaho 158, 179 P. 737; *Morse vs. Steele* (Cal.) 86 P. 693. For collection of authorities see 130 Am. St. Rep. 324, and 21Am. Jur. 587, Sec. 365 and 589, Sec. 366.

Under the provisions of the statute (Sec. 15-604 I.C.) a non-resident creditor desiring to present a belated claim should apply for an order before the decree of distribution is entered. *Penn Mutual Life Insurance vs. Beauchamp*, *supra*.

No issues were joined in the probate court contesting the final decree of distribution or the settlement of the final account and the district court only had jurisdiction to hear *de novo* issues framed, if any, in the probate court. *Collins vs. Lindsay*, 33 Idaho 230, 191 P. 357; Sec. 17-206 I.C.; *Shaw vs. McDougall*, *supra*.

It appears that appellant having failed to present her claim within the time limited in the notice to creditors, and having failed to apply for or secure an order extending the time before the decree of final distribution had been entered or make any objection to the said final account and the granting of the decree of distribution in the probate court, cannot for the first time in the district court or here, be heard on issues never presented before the probate court.

In appellant's brief she argues extensively that there was a fraud, either actual or constructive, committed. The fact of the matter is that she had approximately twenty-five days to present her claim after being furnished with a claims blank and other information requested, and the time for presentation of the claim and the time for application for an extension of time expired before any action was taken.

Appellant claims that facts which should have been disclosed to her were concealed by the executrix and because of this fact she suffered loss. We are unable to find from the record any such concealment, and the citations contained in appellant's brief applicable to actual or extrinsic fraud are not pertinent to the situation presented. Judgment is affirmed. Costs to respondent.

Taylor, Smith and McQuade, JJ., concur.

Porter, J., dissents.

Reported in 312 Pac 2nd.

Entered May 31, 1957.

[Endorsed]: Filed August 12, 1957.

[Title of District Court and Cause.]

MINUTE ORDER AUGUST 12, 1957

This Cause came on regularly this date in open court for hearing on Plaintiffs Motion to file an Amended Complaint and Defendant's Objection to filing an Amended Complaint and Motion to file a Supplemental Answer, Frank E. Chalfant, Sr., and Raymond L. Givens, appearing as counsel for the Plaintiff and J. M. Leggat and and Karl Paine appearing as counsel for the Defendant.

After a discussion by counsel of the respective parties it was ordered that the Motion to file a Supplemental Answer be granted.

It was further ordered that at this time the court would not rule on the Motion to file an Amended Complaint and this matter was set for Pretrial hearing, Friday, August 16, 1957, at 11 a.m.

[Title of District Court and Cause.]

Civil Action 3253

AMENDED COMPLAINT

Plaintiff complains of the defendant and for her first cause of action alleges:

First Cause of Action

I.

That plaintiff is a citizen of the State of California, and defendant is a citizen of the State of Idaho, and that the matter in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interests and costs.

II.

That Henry Lincoln died testate at Boise, County of Ada, State of Idaho, on the 27th day of August, 1955, being at the time of his death, a resident of said county and state, leaving estate therein consisting entirely of personality; that, thereafter, such proceedings were had in the Probate Court of Ada County, State of Idaho, on the 23rd day of September, 1955; that the last will and testament of the said decedent was admitted to probate and Eliza-

beth Lincoln was duly appointed as executrix thereof; that she duly qualified as such executrix and letters testamentary were issued to her; and that she ever since has been and now is the duly qualified and acting executrix of the said last will and testament.

III.

That the said Henry Lincoln, in his lifetime, became indebted to plaintiff, said indebtedness arising out of and under an agreement in writing, made and entered into the 14th day of September, 1938, while the said Henry Lincoln and plaintiff were husband and wife, at Los Angeles, California.

IV.

That the said agreement was fully performed by plaintiff and unperformed by the said decedent who failed to pay during his lifetime, the amounts due thereunder each month, or at all. That the sum of \$25,500.00 thereunder is now due, owing, payable and unpaid, a copy of which agreement is hereto annexed as "Exhibit A," and made a part hereof, and a copy of the decree of absolute divorce of plaintiff and defendant annexed as "Exhibit B," and made a part hereof.

V.

That on or about the 7th day of February, 1956, plaintiff duly presented her duly verified creditor's claim to the said executrix before decree of distribution was made or entered in said estate of Henry Lincoln, deceased, in the said Probate Court.

VI.

That on the 9th day of February, 1956, the said defendant, as such executrix, rejected plaintiff's said claim, and this action is commenced within three months thereafter as required by Section 15-609 Idaho Code, requiring this action to be so commenced.

VII.

That the said defendant, nevertheless, failed to report to the said Probate Court or to disclose to any judge thereof, the fact of the presentation of the said claim, but instead misrepresented to the court that all debts of decedent and of his said estate had been paid and discharged, and that no such creditor's claim had been presented to executrix, and on the 17th day of February, 1956, the said Probate Court therefore made, entered and recorded its decree of final distribution of the said estate of the said Henry Lincoln, deceased, of the entire estate to said defendant personally.

Plaintiff complains of the defendant and for her second cause of action alleges:

Second Cause of Action

I.

Plaintiff hereby realleges all her allegations in her first cause of action and, in addition thereto, alleges as follows:

II.

That the said defendant, Elizabeth Lincoln, is the sole heir and sole legatee of the said Henry

Lincoln, deceased, and that as such she claims and asserts that she is entitled to all of the residue of the estate of Henry Lincoln, deceased.

III.

That plaintiff, Gladys E. Lincoln Gramm, is a prior wife of the said Henry Lincoln, deceased, and as such at the time of their divorce received a property settlement in the sum of \$125.00 per month for the rest of the natural life of her said husband, Henry Lincoln, by said written agreement.

IV.

That there is now due, owing, payable and unpaid on the said property settlement agreement and decree of divorce the sum of \$25,500.00 to plaintiff herein.

V.

That plaintiff is entitled to receive out of the estate of the said Henry Lincoln, deceased, the residue thereof in the hands of the defendant remaining in the sum of \$21,921.94, which sum was ordered by the Probate Court of Ada County, Idaho, on February 17, 1956, to be distributed to defendant contrary to equity and justice, which constitutes unjust enrichment of said defendant, Elizabeth Lincoln, in violation of the rights of this plaintiff.

VI.

That defendant at all times prior to February 17, 1956, during her marriage to said Henry Lincoln, deceased, well knew that the said Henry Lincoln was

formerly married to plaintiff; that plaintiff and her said husband had been divorced, and that they had executed the said property settlement agreement.

VII.

That the said defendant, in equity and good conscience, should be required to restore, pay to and set over to the plaintiff as a trust fund held by said defendant for the use and benefit of plaintiff, the said sum of \$21,921.94.

VIII.

That the defendant is under obligation from the ties of natural justice and equity to refund to the plaintiff the sum of \$21,921.94, as an implied debt; for defendant to retain such sum of money, which she in equity and good conscience ought not to keep, is to put in jeopardy all of the rights in equity of the plaintiff, unjustly enrich defendant to the wholly and inequitable detriment of plaintiff.

Wherefore, Plaintiff prays:

1. Under her first cause of action, that the defendant be compelled absolutely to perform the said agreement dated September 14, 1938, notwithstanding the Probate Court decree and order, that judgment be entered for plaintiff and against defendant for the sum of \$25,000; and,

2. Under her second cause of action, that sum of \$21,921.94, unjustly and inequitably ordered to be distributed to defendant be impressed and impounded herein as a trust fund to be awarded to the person entitled thereto;

3. For such other and further relief as the court may deem just and meet in the premises, and for plaintiff's costs necessarily incurred in this action.

/s/ RAYMOND L. GIVENS,
Attorney for Plaintiff.

Duly Verified.

[Exhibit A attached to the foregoing is identical to Exhibit A attached to Complaint. See pages 6 to 11.]

EXHIBIT "B"

In the Eighth Judicial District Court of the State
of Nevada, in and for the County of Clark

No. 7364

HENRY LINCOLN,

Plaintiff,

vs.

GLAYDS E. LINCOLN,

Defendant.

DECREE OF DIVORCE

The above-entitled cause coming on regularly for trial before the above-entitled Court, sitting without a Jury, on the 2nd day of March, 1937, upon the complaint of the plaintiff, and the plaintiff appearing personally and through his attorneys, Messrs. Foley & Henderson; the defendant having filed her Appearance and Waiver, waiving the time for

the setting of the trial of said cause, and also waiving the Findings of Fact and Conclusions of Law; and the Court having before it all the papers, pleadings and files in said action; and being fully advised in the premises and satisfied that this action has been duly and regularly commenced, that the plaintiff has been a bona fide resident of the State of Nevada for more than six weeks prior to the commencement of said action; and that the Court has full and complete jurisdiction in the premises, both as to the subject matter and the parties hereto;

Now, after hearing the witnesses produced, sworn and testifying on behalf of the plaintiff, and all the material allegations of the complaint having been satisfactorily proved to the Court,

It Is Ordered, Adjudged and Decreed, that the bonds of matrimony now and heretofore existing between the parties hereto, Henry Lincoln, the plaintiff, and Gladys E. Lincoln, the defendant, be and the same are hereby dissolved, set aside and held for naught, and that the said plaintiff be and he is hereby decreed an absolute divorce from said defendant.

Done in open Court at Las Vegas, Nevada, this 2nd day of March, 1937.

WM. E. ORR,
District Judge.

Lodged August 16, 1956.

Filed March 2, 1937.

[Title of District Court and Cause.]

PRETRIAL STIPULATION

A pretrial conference having been heretofore set by this court for 11:00 o'clock a.m., August 16, 1957, and for the purpose of said pretrial conference it is hereby stipulated by and between the respective parties hereto as follows, to wit:

I.

That plaintiff is a citizen of the State of California and defendant is a citizen of the State of Idaho; and that the matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

II.

Plaintiff and Henry Lincoln, then husband and wife, separated about 1937. Plaintiff was then and ever since has been and now is a resident of California. March 2, 1937, Henry Lincoln obtained a divorce in Clark County, Nevada, from plaintiff. Subsequently, both parties remarried.

III.

September 14, 1938, plaintiff and Henry Lincoln signed and acknowledged a property settlement agreement wherein, among other provisions, Henry Lincoln agreed to "pay Party of the Second Part, Gladys E. Lincoln, his wife, the sum of One Hundred Twenty-five Dollars (\$125.00) per month during the rest of his natural life, payable on the 15th

day of September, 1938," and "that the said parties hereto hereby accept the considerations moving to each of them under this agreement as a full and complete settlement of all property rights, and each party agrees to accept as a complete settlement of all of his or her right to alimony, maintenance, attorney's fees and costs," and "that this agreement is not made and shall not be construed as an agreement for or in aid of any divorce and that it is to remain in full force and effect whether the parties continue with the relation of husband and wife, or such relations may hereafter be dissolved for any cause whatever."

IV.

That the said Henry Linclon died testate on August 27, 1955, in Boise, Ada County, Idaho, being then resident therein. Pursuant to the provisions of the will leaving all his property to defendant, Elizabeth Lincoln, she was duly and regularly appointed executrix and due and regular notice thereof with publication of notice to creditors was made, the first publication of notice to creditors being September 29, 1955, and the last publication being October 20, 1955.

V.

December 29, 1955, Joseph Shane, attorney for the plaintiff, wrote the Clerk of the Probate Court of Ada County, State of Idaho, as follows:

"I recently learned that one Henry Lincoln died August 27, 1955, at Boise, Idaho, and that final services were held December 17, 1955, at Salt Lake

City, Utah. I desire to know if there are any probate proceedings presently pending in your county in connection with the estate of said deceased. I do not know whether or not he was a permanent resident of Boise at the time of his death. However, this inquiry is to get a starting point. If you do not find any such proceedings pending in your county, please advise me where to write where such statistical information is kept, assuming such probate proceedings were filed in some other county in the State of Idaho. If you find such proceedings pending in your county, please give me the name of the attorney, the number of the proceedings and title thereon and the person to whom a claim against the estate should be sent and also the appropriate creditors claim forms which are used in your jurisdiction. Thank you in advance for giving the matter your early attention."

VI.

On January 3, 1956, Honorable John Jackson, Probate Judge of the Probate Court of Ada County, Idaho, replied thereto as follows:

"We are in receipt of your letter of December 29, 1955, regarding the above-named estate matter.

"Petition for Probate of the Will of this party was filed September 7, 1955, and on September 23, 1955, Elizabeth Lincoln was appointed Executrix and duly qualified on the same date.

"Karl Paine, Box 483, Boise, Idaho, is the attorney in this matter and claims may be sent to him."

VII.

February 6, 1956, plaintiff's attorney, Joseph Shane of Los Angeles, California, wrote defendant as executrix of the will of Henry Lincoln, c/o Karl Paine, her attorney, Box 483, Boise, Idaho, that being the designated place for the presentation of claims, as follows:

“I enclose herein a Creditor's Claim on behalf of Gladys E. Lincoln Gramm, formerly Gladys E. Lincoln, in the sum of \$25,500.00, the same being duly executed and I have attached to said Creditor's Claim a photostatic copy of the property settlement agreement upon which said claim is based. I have the original of said agreement in my possession and if for some reason you desire to see it I shall be pleased to send it to you.

“My client, the former Mrs. Lincoln, has been and is now a resident of the County of Los Angeles, State of California, and has had no notice of the first publication of notice to creditors and only learned the latter part of December, 1955, that Mr. Lincoln had passed away. I do not know when the first publication of notice to creditors was made and, consequently, I am unable to determine if this creditor's claim is filed within time. If for some reason the same is to be rejected because of the time of presentation, please advise me thereof at once so that an affidavit by my client can be made and presented to the probate judge permitting the filing of this creditor's claim by reason of my client's

nonresidence in Idaho and lack of knowledge of publication of notice to creditors.

“Please accept my thanks in advance for your immediate reply to the matters stated herein.”

VIII.

Plaintiff's claim as creditor was as follows and enclosed therewith:

“Moneys accruing and due Gladys E. Lincoln, Creditor, from Henry Lincoln, Deceased, under and pursuant to a certain property settlement agreement in writing dated September 14, 1938, at Los Angeles, California, a photostatic copy of the original thereof is attached hereto, made a part hereof as though herein set out in full. Under and pursuant to said contract there became due and payable for the period commencing September 15, 1938, to and including August 15, 1950, a period of 144 months, at \$125.00 per month, the sum of \$18,000.00 and for the period commencing September 15, 1950, to and including August 15, 1955, a period of 60 months at \$125.00 per month, the sum of \$7,500.00.

“Total Claim\$25,500.00

“The obligation under said contract was entered into in Los Angeles County, California, and payable therein and following execution of said contract the deceased left the State of California and affiant has no information that he ever returned to said State.”

(Creditor's Claim duly verified.)

IX.

February 8, 1956, defendant filed her first and final account and petition for distribution of the estate which was duly and regularly noticed, and to which plaintiff filed no objections.

X.

On February 9, 1956, Mr. Paine responded to the above last-mentioned letter as follows:

“Reference is made to your letter of February 6, 1956, addressed to Mrs. Elizabeth Lincoln, Executrix of the Estate of Henry Lincoln, deceased, enclosing a creditor’s claim against the said estate. Since you mailed the letter in my care it is hardly necessary to say that I am replying thereto as attorney for the estate.

“I note your inquiry. Disclaiming any intended discourtesy to you, either personally or professionally, I am constrained to say that I am in no position to supply the information you seek, or to aid or appear to aid you in the presentation or prosecution of this claim. On the other hand it is my present duty and earnest purpose to do all in my poor power to defeat the claim, which on its face is phony. Mrs. Lincoln has heard of “Connie,” and of the bad time she gave Mr. Lincoln in the long ago, but your letter is the first information she has had of this or any other claim of your client against Mr. Lincoln.

“Do not misunderstand me. This harsh characterization of the claim is not meant to strike at you

over your client's shoulders. I seek no personal quarrel with you. You may not know anything of the claim's history.

"Lastly, I note that the claim is divided into two parts, obviously because it is thought the first item may be outlawed. In my opinion it is outlawed. If your client will withdraw it, I will entertain an offer of compromise from you based on the second item. Lawsuits are costly."

XI.

To which letter Mr. Shane, on February 15, 1956, replied as follows:

"Thank you for your letter of February 9, 1956, regarding the above matter.

"I note in your letter a suggestion that the claim lacks any merit. The agreement upon which the claim is based was prepared by Mr. Walter T. Casey, an attorney of excellent reputation in this area. Mr. Casey was acting as attorney for Mr. Lincoln at the time in question, and execution of the agreement by the parties before a notary public indicates at least that the parties undertook to bind themselves pursuant to the terms of the agreement. By obtaining execution of this agreement Mr. Lincoln obtained for himself such benefit and advantage that he desired and prevented Mrs. Lincoln from making or asserting any other claims or demands. The Creditors Claim filed in this matter seeks to recover the amounts which Mr. Lincoln failed to pay.

"I agree with your comment that 'Lawsuits are costly.' You suggest the possibility that this matter could be settled. Assuming that a portion of our claim is waived and confined only to the second portion of the claim, would the executrix be willing to pay \$7,500.00?

"I shall appreciate being advised thereon."

XII.

Mr. Paine's response on February 17, 1956, being as follows:

"Your letter of February 15, 1956, was received this morning.

"I did not mean to intimate that the agreement was 'phony' ab initio, and neither did I suspect Mr. Casey's good faith.

"What I had in mind was that your client waited until Mr. Lincoln was dead, before attempting to enforce it. As I wrote to you, Mrs. Lincoln never heard of this claim until she received your letter. Naturally Mrs. Lincoln feels that Mr. Lincoln would have told her about the claim if he had not thought it had been satisfied. He told her circumstantially about his affairs many times, and he went into great details in explaining to me what might happen upon his death at the time I prepared his will, but he never said a word to me about this particular claim.

"If Mr. Lincoln had suggested to Mrs. Lincoln that he was indebted to your client, she would then

feel that she herself was under a moral obligation to Mrs. Gramm, but the fact is Mr. Lincoln led her to believe that he owed Mrs. Gramm nothing, hence Mrs. Lincoln's attitude is that the claim is at most a legal obligation which she is free to defeat if she can.

“In view of the situation as I have explained it to you, it is hardly necessary for me to say that Mrs. Lincoln rejects your suggestion of a compromise.”

XIII.

On February 17, 1956, the said Probate Court made and entered its decree of settlement of final account and final distribution distributing the said estate of Henry Lincoln, deceased, to defendant herein, his widow, in accordance with the will.

XIV.

March 16, 1956, plaintiff petitioned the said Probate Court to set aside its said decree of distribution, detailing the above chronological sequence of events, on the ground that defendant had falsely represented to the court that all the debts of the said deceased and his estate had been fully paid and that her final account exhibited not only the debts that had been paid, but all claims that had been presented or allowed, whereas the account and petition for decree did not disclose the filing of plaintiff's creditor's claim. A general demurrer thereto, motion to strike and motion to overrule were interposed on the ground substantially that

plaintiff's claim had not been filed within time, that is within four months of the first publication of notice to creditors, and that plaintiff had not applied to the Probate Court to extend the time for presentation of claims to the executrix and for an order of said Probate Court extending time therefor.

XV.

April 5, 1956, and after Decree of Distribution had been entered by the Probate Court, plaintiff petitioned for extension of time for filing her creditor's claim by reason of said plaintiff being out of the State and having had no actual notice, directly or indirectly, of notice to creditors in the estate herein involved, praying for an order of the court extending time for filing her creditor's claim presented February 17, 1956, and that defendant as executrix be ordered by the court to reject or allow, and act upon her claim and for such other relief as might seem meet. This petition was accompanied and supported by affidavits of plaintiff and her attorney, Joseph Shane, reiterating and augmenting her petition and statement that she was a non-resident of the State of Idaho and had no actual notice of the publication of notice to creditors or probate proceedings until the time she made out and presented her claim as detailed above. No counter showing was made.

XVI.

April 11, 1956, Honorable John Jackson, Probate Judge of Ada County, Idaho, sustained defendant's demurrer, motion to overrule and motion to strike

plaintiff's petition to vacate the decree of distribution and denied plaintiff's motion for extension of time for presenting her claim.

XVII.

Thereafter, plaintiff appealed to the District Court of the Third Judicial District of the State of Idaho, for Ada County, from the decree of settlement and distribution.

XVIII.

Upon hearing in the District Court plaintiff introduced oral evidence in support of her position that she was a nonresident of the State of Idaho, and of the property settlement agreement, that she had no actual notice of the publication of the notice to creditors or of the pendency of the probate proceedings.

XIX.

At the conclusion of the hearing the District Court stated:

“That the judgment of this court would be that the decree of settlement of first and final account and making distribution of the estate as made by the Probate Court is affirmed and the attempt to appeal from anything else is dismissed.”

and entered judgment substantially as follows:

“It is ordered and adjudged, and this does order and adjudge that the order and decree of the Probate Court of Ada County, Idaho, approving, allowing,

and settling the first and final account of respondent as executrix of the estate of Henry Lincoln, deceased, and making final distribution therein be and the same are hereby affirmed, and the appeal dismissed——”

XX.

On appeal therefrom to the Supreme Court, on a record containing all of the above documents, records and proceedings, it rendered its decision May 31, 1957,

312 Pac. 2d 113

sustaining the actions of the Probate and District Courts on the ground that plaintiff had not filed her creditor's claim on time and the same was barred by the statute of limitations.

XXI.

May 5, 1956, plaintiff filed this suit in the District Court of the United States for the District of Idaho, Southern Division, on pleadings and records therein being as the files and records of this court referred to and incorporated as such in this stipulation.

XXII.

Each of the parties hereto reserves the right to object to the competency, relevancy, or materiality of any of the letters or documents herein above set out.

/s/ FRANK E. CHALFANT,

/s/ RAYMOND L. GIVENS,

Attorneys for Plaintiff.

/s/ KARL PAINE,

/s/ J. M. LEGGAT,

Attorneys for Defendant.

[Endorsed]: Filed August 16, 1957.

[Title of District Court and Cause.]

OPINION

Healy, Acting District Judge

It appears to me that the issue or issues in this case have been fully disposed of by the Supreme Court of Idaho in its opinion reported in *Gramm v. Lincoln*, 312 P. 2d at p. 113.

Plaintiff's motion for leave to file an amended complaint will be denied, and her action will be dismissed.

Let judgment be entered accordingly.

/s/ WILLIAM HEALY,

Acting District Judge.

[Endorsed]: Filed August 19, 1957.

In the District Court of the United States for the
District of Idaho, Southern Division

Civil Action 3253

GLADYS E. LINCOLN GRAMM,

Plaintiff,

vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, De-
ceased,

Defendant.

ORDER

The above cause came on regularly to be heard upon plaintiff's motion for leave to file her amended complaint, and defendant having filed objections thereto.

Defendant having heretofore, and by leave of this Court, filed a supplemental answer in which is set out the decision of the Supreme Court of Idaho in Gramm v. Lincoln (312 p. 2d 113), which said decision is final; and it appearing therefrom that the issue or issues in this action have been fully disposed of by the Supreme Court of Idaho.

Now, Therefore, It Is Ordered, Adjudged and Decreed, that plaintiff's motion for leave to file her amended complaint be, and the same is hereby, denied; that plaintiff's action be, and the same is hereby, dismissed with prejudice as of this date; and that the defendant have her costs, if any, incurred in this action.

Dated: August 27, 1957.

/s/ WILLIAM HEALY,
U. S. District Judge.

[Endorsed]: Filed August 27, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Gladys E. Lincoln Gramm, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order entered denying leave to amend her complaint, dismissing the action with prejudice, and allowing costs, if any, to defendant, in this action on August 27, 1957.

/s/ FRANK E. CHALFANT, SR.,

/s/ RAYMOND L. GIVENS,
Attorneys for Appellant,
Gladys E. Lincoln Gramm.

[Endorsed]: Filed September 25, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DESIGNA-
TION OF CONTENTS OF RECORD ON
REVIEW

To the Clerk of the Court; and to the Above-En-
titled Court:

Appellant hereby applies for an extension of
thirty days within which to designate the contents
of record on review.

/s/ FRANK E. CHALFANT, SR.,
Attorney for Appellant.

ORDER

Upon reading and filing the above and foregoing
petition for extension of time for designation of
contents of record on review;

It Is Hereby Ordered that appellant may have
thirty days extension of time to designate the rec-
ord on review.

Dated: October 25th, 1957.

/s/ EDWARD P. MURPHY,
U. S. District Judge.

[Endorsed]: Filed October 25, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Plaintiff-appellant herewith presents, by authority of statute and by virtue of the equity jurisdiction inherently vested in this Honorable Court, the following points upon which she intends to rely:

I.

The court erred in denying plaintiff's motion for leave to file her amended complaint, in denying the broad equity jurisdiction of this Honorable Court, and in dismissing plaintiff-appellant's complaint with prejudice.

II.

The court erred, since the Probate Court and District Court of Ada County, State of Idaho, were wholly without equity jurisdiction to try the case on its merits, in refusing to exercise that equity jurisdiction of this suit for specific performance of the agreement sued on, this court being the proper court to try this suit on its merits.

III.

The court erred, likewise, in denying the equity jurisdiction of the cause of action stated in the amended complaint whereby plaintiff-appellant seeks to hold defendant-appellee responsible for her unjust personal enrichment at the expense of plaintiff-appellant, for withholding from plaintiff-appellant the indispensable information as to the date

of first publication of notice to creditors when plaintiff-appellant specifically requested same and was entitled thereto under the Idaho Statute as a creditor outside the state who had not received the notice provided by the notice to creditors referred to in the said proviso, to Sec. 15-604 as Chapter 6, Title 15 of the Idaho Code.

IV.

That the court erred in denying the statutory right to trial on the merits since this suit was timely commenced under Sec. 15-609 Idaho Code, as a suit in equity.

V.

That the court erred when it failed and refused to recognize the equitable jurisdiction created through the probability that this plaintiff-appellant, as the former wife, does not necessarily have to present her claim at all, since there was no agreement but the one sued on, which agreement was made in consideration of the duty of support owed to her by the decedent.

VI.

That the court's rejection of plaintiff-appellant's claim herein and dismissal of her action was and is a denial of due process of law in violation of the Federal Constitution in that she did not have any notice of the time in which claims had to be filed, and she filed her claim prior to the decree of distribution and was arbitrarily denied recourse under and as provided by Sec. 15-604 Idaho Code.

VII.

That the court erred in depriving plaintiff-appellant of all her remedies at law and in equity, by treating the Idaho Supreme Court decision as determinative of all issues, reference being hereby made to the order dated August 27, 1957, when that Honorable Court's opinion and decision merely denied plaintiff-appellant a plain, speedy and adequate remedy at law, and concerned only her right to present her claim after the time limitation stated in the notice to creditors had expired.

VIII.

That the court erred in failing and refusing to hear on its merits the allegations of fraud contained in the complaint, and in the amended complaint.

IX.

That the court erred in failing and refusing to consider the allegations of fact out of which plaintiff-appellant contends that a trust of the estate resulted upon the distribution of the estate by the Probate Court of Ada County, irrespective of plaintiff-appellant's claims, contrary to the dictates of justice.

/s/ FRANK E. CHALFANT, SR.,

/s/ RAYMOND L. GIVENS,

Attorneys for Plaintiff-
Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed November 13, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

May 5—Filed Complaint.

May 5—Issued Summons.

May 18—Filed Summons—unserved.

June 2—Filed Answer.

Aug. 20—Filed Motion to Require Plaintiff to
Reply to Deft's. Answer.

Aug. 20—Filed Notice of Motion.

Sept. 5—Entered Order Granting Motion to Com-
pel Plaintiff to Reply to Defendant's An-
swer (Judge Clark).

Sept. 26—Filed Application for Order Enlarging
Time.

Sept. 26—Filed Order Enlarging Time & Allowing
20 days to Answer (Clark).

Oct. 12—Filed Plaintiff's Reply to Affirmative De-
fense.

Oct. 15—Filed Motion for Summary Judgment.

Oct. 25—Record of Hearing; Motion for Summary
Judgment taken under advisement, 10-5
days for briefs (Clark).

Oct. 25—Filed Plaintiff's Brief.

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June 29—Filed Motion to File a Supplemental an-
swer.

June 29—Filed Notice of Motion.

June 29—Filed Motion for Leave to File Supple-
ment to Motion for Summary Judgment.

1957

June 29—Filed Notice of Motion.

July 19—Entered Order to join Raymond L. Givens as associate counsel for Plff.

July 23—Filed Motion to add Additional Party, etc.

July 23—Filed Notice of Motion.

July 23—Filed Amended Complaint.

Aug. 5—Filed Objections to Motion for Leave to File Amended Complaint.

Aug. 12—Filed Supplemental Answer.

Aug. 12—Entered Order Granting Motion to file Supplemental Answer and postponing ruling on Motion to File Amended Complaint; and setting pretrial hearing for Aug. 16, 1957, at 11 a.m. (Clark).

Aug. 16—Record of pretrial hearing (Healy).

Aug. 16—Lodge proposed Amended Complaint.

Aug. 16—Filed Pretrial Stipulation.

Aug. 19—Filed Opinion of Wm. Healy, Judge.

Aug. 19—Copies of Opinion sent to Frank E. Chalfant, Raymond L. Givens, Karl Paine and J. M. Leggat.

Aug. 23—Filed Acknowledgment of Service of proposed Order of Dismissal.

Aug. 27—Filed Order Denying Motion to file Amended Complaint, and Dismissing Action with Prejudice and with Deft's. Costs (Healy).

Aug. 27—Notice of Dismissal sent to Frank E. Chalfant, Sr., Karl Paine, J. M. Leggat, and Raymond L. Givens.

1957

Sept. 25—Filed Notice of Appeal—copy to J. M. Leggat.

Sept. 25—Filed Bond for Costs on Appeal.

Oct. 25—Filed Order Extending Time for Designation of contents of record—30 days extension (Judge Murphy).

Oct. 25—Copies of Order to Karl Paine and J. M. Leggat.

Nov. 4—Filed Designation of Contents of Record on Appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Docket entries.
2. Complaint.
3. Answer.
4. Motion requiring plaintiff to reply to the answer of defendant to plaintiff's complaint.
5. Affidavit of Karl Paine re: reply to answer.
6. Order requiring plaintiff to answer affirmative defense (Minute entry of Sept. 5, 1956).

7. Reply to affirmative defense.
8. Motion for summary judgment.
9. Motion to file a supplemental answer.
10. Motion to add Elizabeth Lincoln as an individual heir and legatee.
11. Supplemental answer.
12. Order dated Aug. 12, 1957, by Judge Clark, granting motion to file supplemental answer.
13. Amended complaint lodged Aug. 16, 1956.
14. Pretrial stipulation.
15. Opinion of William Healy.
16. Order or judgment dated August 27, 1957.
17. Notice of Appeal.
18. Order extending time for designation of contents of record on review.
19. Designation of contents of record on review.
20. Statement of points upon which appellant intends to rely.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 15th day of November, 1957.

[Seal]

ED. M. BRYAN,
Clerk.

By /s/ LORA MANSER,
Deputy.

[Endorsed:] No. 15801. United States Court of Appeals for the Ninth Circuit. Gladys E. Lincoln Gramm, Appellant, vs. Elizabeth Lincoln, Executrix of the Last Will and Testament of Henry Lincoln, Deceased, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Idaho, Southern Division.

Filed: November 18, 1957.

Docketed: November 29, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

IN THE
United States
Court of Appeals
For the Ninth Circuit

GLADYS E. LINCOLN GRAMM,

Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, Deceased,

Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court for the
District of Idaho, Southern Division*

FRANK E. CHALFANT, SR.
509 Idaho Building
Boise, Idaho

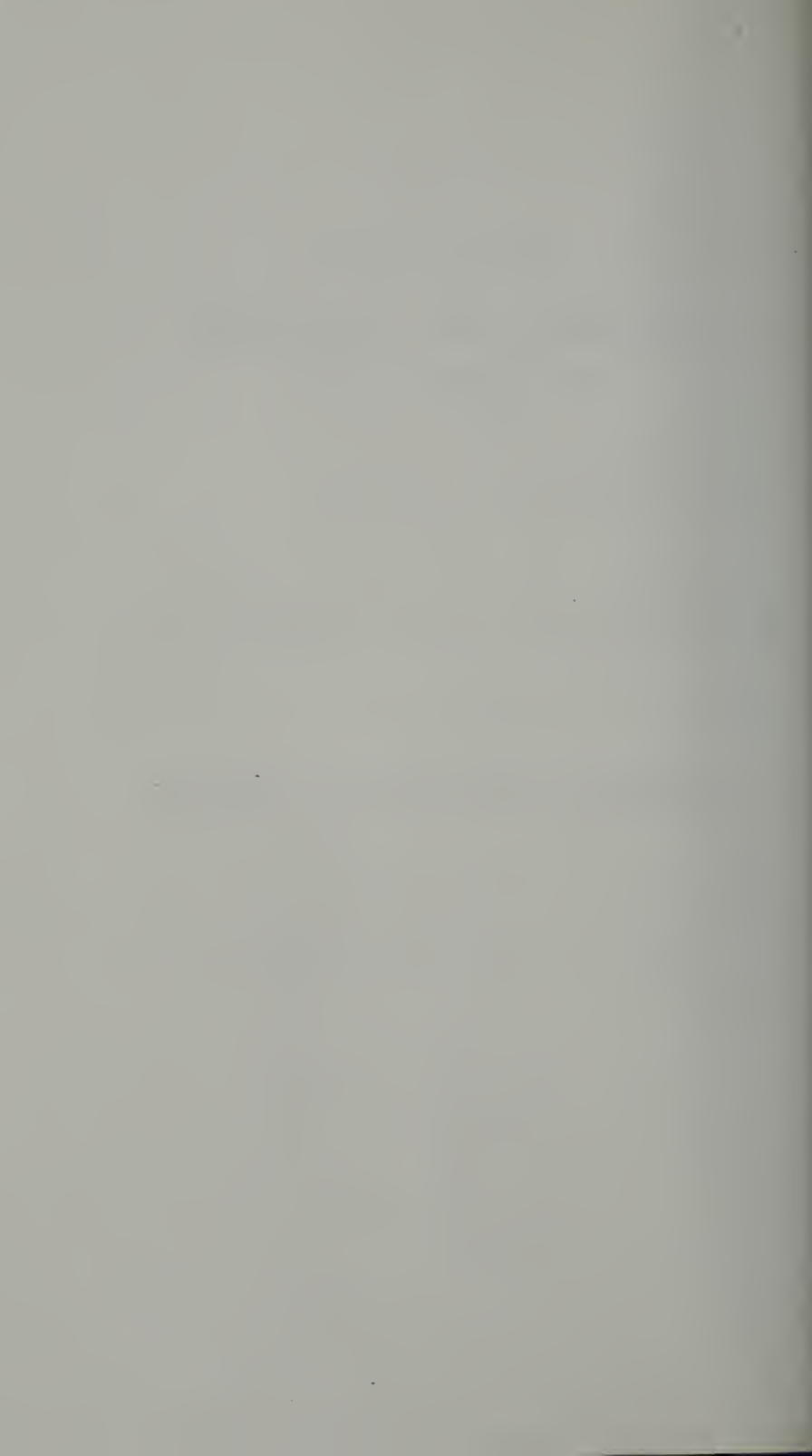
and

RAYMOND L. GIVENS
1530 Idaho Street
Boise, Idaho,

Attorneys for Appellant.

FILE

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IN THE
United States
Court of Appeals
For the Ninth Circuit

GLADYS E. LINCOLN GRAMM,

Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, Deceased,

Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court for the
District of Idaho, Southern Division*

FRANK E. CHALFANT, SR.

509 Idaho Building
Boise, Idaho

and

RAYMOND L. GIVENS

1530 Idaho Street
Boise, Idaho

Attorneys for Appellant

JURISDICTION

By reason of diversity of citizenship, the jurisdiction of this case is that of a federal court of general jurisdiction substituted for a state court of general jurisdiction.

“It has been frequently held by this court that

a creditor can proceed in equity against the heirs who have received the ancestor's estate for satisfaction of his claim against such estate which has accrued after the lapse of time limited for authenticating it against the administrator, or after the close of his administration."

Madison v. Buhl, 51 Idaho 564, 8 P. 2d 271,
273

The federal court's broad chancery jurisdiction has here been invoked because fraud is alleged and in order to impress a trust implied or constructive which arises by operation of law, of the entire estate, or of such estate, if any, as may have been fraudulently transferred.

Equity will impress a trust where legal title is obtained by fraud, violation of confidence or fiduciary relationship, or in any unconscientious manner.

"When property subject to a trust is fraudulently transferred, or when one person, in fraudulent violation of his fiduciary duty, acquires property which equitably belongs to another, or when one person by his actual fraud obtains the title to property in which another is beneficially interested, equity may work out and protect the rights of the beneficial owner by regarding the property as though it were actually impressed with a trust in the hands of the one who holds the legal title, by treating such person as though he were an actual trustee, and by enforcing such trust by means of a conveyance, accounting, pay-

ment, injunction, and other appropriate remedies. There is no other effect of fraud more remarkable, and none exhibits more clearly the power of courts of equity to deal with the substantial realities under the appearance of external forms.”

2 Pomeroy's Equity Jurisprudence
(3rd Ed.) 1658, Sec. 920

Also:

Rest., Trusts Vol. I, Sec. 170 (2)

STATEMENT OF THE CASE

(1) Appellant was completely absent from Idaho at all times during the period in question. (tr. pp. 49, 51)

(2) Appellant's claim was presented in time under the statutory proviso applicable to non-resident creditors without notice. (tr. pp. 49, 51)

(3) Counsel for executrix failed and flatly refused to divulge the date of first publication of notice to creditors, upon specific request being made of him, and of his fiduciary client therefor by counsel for appellant. (tr. p. 51)

The foregoing facts are undenied, and “equity will not suffer a wrong to be without a remedy.”

19 Am. Jur. 311, Sec. 451.

These facts now stand admitted, since undenied.

ARGUMENT

I. APPELLANT'S CLAIM WAS TIMELY PRESENTED IN VIEW OF SECTIONS 15-604 and 15-607, IDAHO CODE.

(1) Appellant's claim was presented ten days before the final decree of distribution was entered. When read in *pari materia*, Secs. 15-604 and 15-607 Idaho Code so provide.

It is appellant's paramount point that her claim was presented to the attorney for appellee, thus to appellee *before* the final decree of distribution was entered. Such presentment is conclusively shown in the transcript herein, pages 13, 25, 49 and 51. Such presentment is not denied and *became effective* because at that time appellant was a non-resident of the State of Idaho, as is likewise shown by the transcript, page 3, paragraph I of the complaint, and not denied in the answer, paragraph XI. (Also tr. pp. 46 and 49)

At that time and prior thereto appellant did not know the time within which claims had to be filed as the transcript shows. (tr. p. 49)

Appellee does not contend appellant had actual notice of the time for filing claims; her defense rests solely on two points: first, that the affidavit, showing appellant was a non-resident and was without actual notice of the time for filing claims when she presented her claim, was not filed until after the final decree of distribution, and no order was made

authorizing the presentation of the claim; and, second, that the proceedings in the state court are res adjudicata.

Appellee in her brief states:

“A belated claim of a non-resident creditor is of no validity unless its presentation be preceded or accompanied by an order of Court permitting it to be presented.”

top of page 12

“The last sentence of the specification, namely, that the time for filing an affidavit is not definite is a mere quibble.”

top of page 16

The statute does not require either. Sec. 15-604 Idaho Code.

The facts of non-residence, absence, and lack of knowledge are the determining factors, not when or how made to appear.

Mason v. Pelkes, 57 Idaho 10, 17 59 P. 2d 1087

Call v. R.M.B.T. Co., 16 Idaho 551, 558 102 P. 146

Mendini v. Milner, 47 Idaho 322 276 P. 35

Pacific States Savings, Loan and Building Co. v. Fox, 25 Nev. 229 59 P. 4

Young v. Campbell (Okla.) 16 P. 2d 65

Certainly, if non-residence and lack of knowledge be disputed, proof thereof and a finding thereon would have to be made. But where there is no denial, as herein, and the only showing made, though made after the presentation of the claim, is conclusive that appellant was absent and without knowledge of the publication, her claim was filed in time. Proof of publication of notice to creditors, for instance, is not the prerequisite of a decree, but the fact of publication is basic.

Appellee's statement, page 5, that "Precisely the same argument could be made in an action brought on a rejected claim six months or six years after notice of its rejection." is a complete non sequitor because the claim herein was in compliance with the statute, 15-604 Idaho Code, being presented before the final decree of distribution. The existence therefore, of the claim, admittedly presented, of a non-resident claimant and her entire lack of knowledge (tr. pp: 49, 51) are not denied in this case and, if necessary, can be proved. In any case, the delay has no nullifying effect.

Sterling v. Title Insurance & Trust Co., 53
CA 2d 583 128 P. 2d 31

Staley v. Brannan, 243 P. 2d 346, 206 Okla.
292

While the main point in Staley v. Brannan was rights under domestic and ancillary administration, the principle of the claim being on time when presented before the decree of final distribution was

approved in *State v. District Court of 1st Judicial District, (Mont.)* 43 P.2d 682.

Appellee falls into the same error the State Court did when, on page 4 of her brief, she states that Section 15-604 Idaho Code permits the probate court for good cause to be shown to order an extension for presentment only if such extension is requested before a decree of distribution. The statute does not so declare. All it states is that "it may be presented at any time before a decree of distribution is entered" when it is made to appear that claimant had no notice by reason of being out of the state.

The statute does not directly or by implication require a showing *before* the presentation. The timely presentation of the claim is the *sine qua non*. The affidavit or showing can be made at some time later in the court having the claim before it, in this suit.

The statement on page 15 of appellee's brief that "The question is not whether the claim was presented before the decree of distribution was entered, but whether it was presented before the time limited in the notice to creditors for the presentation of claims" is truly appalling in its complete disregard of Sec. 15-604 Idaho Code. Statutes may not thus be blandly discarded. All of appellee's argument, therefore being of no greater efficacy, must fall of its own weight.

Appellant has never contended nor stated that appellee was under any duty to see that appellant presented her claim in time. Appellee, at page 7 of her brief, thus misstates appellant's position and attempts to thus distract by dragging a red herring.

Appellant stated and contends here that appellee *violated* the trust imposed on her by appointment as executrix when she failed and refused to give information (tr. p. 51) as to the time when claims had to be filed. Such information was material.

(2) Far from attempting to substitute the principle of unjust enrichment for the legal requirements, the principle of unjust enrichment merely supports appellant's allegations and prayer that a constructive trust should be impressed upon the estate in the hands of appellee. (tr. p. 43)

Asher v. Bone, 100 Fed. 2d 315, 317 (2) (11)

For specific performance of a property settlement agreement, no presentation whatever of a claim is required.

Ashbauth v. Davis, 71 Idaho 150, 227 P. 2d 954, 32 ALR 2d 361

Ferrel v. McVey, 71 Idaho 339, 232 P. 2d 134

Kalaterna v. Wright, 94 CA 2d 926, 212 P. 2d 32, Syl. (16)

Baird v. Knutzen, 49 W. 2d 308, 301 P. 2d 375, 376 (2)

Casady v. Scott, 40 Idaho 137, 237 P. 415, 420

Toulouse v. Burkette, 2 Idaho 184, 10 P. 26, and,

49 Am. Jur. 96, Sec. 79, quoted with approval
In re Davis' Estate, 171 Kans. 605, 237 P. 2d 396, 402 (9)

II. THE STATE DECISION WAS MERELY A REFUSAL BY THE SUPREME COURT TO CONSIDER APPELLANT'S CLAIM FOR THE REASON THAT CREDITOR'S CLAIM HAD BEEN REJECTED AND THERE WAS NO ISSUE FRAMED IN THE PROBATE COURT.

(1) There was no record prior to the decree of distribution on the issue between claimant and the executrix in the probate court. The record is here as an independent suit on the rejected claim for the first time. The subject matter of this suit was not before the probate court, nor any other state court. It is here as an independent suit against the personal representative and the heir, one and the same person.

Appellant's entire lack of any plain, speedy or adequate remedy at law is clear and appellant filed her complaint in the federal court seeking consideration of her charge of fraud which is made the basis of this her independent adversary suit to establish a trust in equity, as well as her statutory suit on the rejected claim under Secs. 15-803 and 15-609 Idaho Code.

(2) It is a direct attack, not a collateral attack upon the decree of distribution.

Swinehart v. Turner, 38 Idaho 602, 224 P. 74

Asher v. Bone (Idaho), 100 Fed. 2d 315

Had appellant received notice in any form, even a clipping from the Boise newspaper, showing the date of the first publication of notice to creditors

from the executrix, she would have been in a position for a period of ten days to appear and file her affidavit of non-residence and non-notice. Was it or was it not because of appellee's refusal to divulge this material and important information that appellant failed to so do? Certainly, the delay in presenting her affidavit was a delay which was due in part to appellant, but that part was not necessarily fatal. The last one duty should be hers. The last ten days were fatal in the probate court only. The fiduciary duty was appellee's duty. Her counsel's act was her act. It was and is fatal to the decree of distribution.

Conceding counsel, by notice that probate proceedings had been instituted and were pending, was charged with the duty of making inquiry, this he did and went at once to the most reliable source of information, the personal representative of the estate, and did not ask any layman or other lawyer. It was Mr. Shane who was to determine, as stated by him in his letter whether or not an affidavit would be required. (tr. p. 49)

His request was made not for the purpose of asking the executrix or her counsel to "run errands" for appellant, nor for appellee, personally as beneficiary, but simply to request compliance with the duty which the executrix owed as fiduciary. As stakeholder she was fiduciary for all interested parties, owed to all interested persons, and especially to non-residents, a very clear duty of impartiality under Secs. 15-604 and 15-607 Idaho Code, as well as notice under Sec. 15-601 Idaho Code requiring notice to

creditors to be given as provided by law. Appellant's disadvantage appears clear, on the admitted facts; the statutes safeguard her as they were enacted to do.

Appellant's counsel did (what any Idahoan would) inquire of the attorney for the estate: the fountain head for such information; to whom the probate court had referred. Why should counsel beg that question?

III. WHETHER APPELLANT WAS MISLED BY MR. PAINE'S LETTER IS IMMATERIAL.

It was fraud in law for a personal representative to withhold the material information which was admittedly withheld.

Appellee quotes the transcript (tr. pp 51-52), *not appellant's brief*, when she says that the last point appellant labors is that she was misled by a letter. We do not think that the court can possibly be misled by counsel for appellee as to appellant's position in this matter.

We do not rely upon any misrepresentation or misleading statement. We do rely upon the concealment of a material fact which the personal representative as fiduciary was duty bound as fiduciary, if not legally bound, Sec. 15-601 Idaho Code, to give to all creditors whether resident or non-resident of the State of Idaho.

This fiduciary was also made a defendant individually for the reason that she used her legally impartial position as personal representative of the

estate to further her individual interests. This was done through her counsel who obviously and palpably wrote the letter of February 9, 1956, in the interests of Elizabeth Lincoln individually. Therefore, neither the fiduciary nor her counsel were impartial as between the appellant and appellee, the former wives of the decedent.

That it is fraud in law for a personal representative to take a position in which his individual interests will conflict with his duty as impartial and stake-holder fiduciary, is too well established to require any citations of authorities.

Woodson v. Raynolds, 42 N.M. 161, 76 P. 2d 34, 39

2 Bancroft's Probate Practice, 297, Sec. 341, (Note 20)

Flynn v. Driscoll, 38 Idaho 545, 223 P. 524, 34 ALR 352

Blackinton's Estate, 29 Idaho 310, 158 P. 142

State Insurance Fund v. Hunt, 52 Idaho 639, 17 P. 2d 354

Chapin v. Stuart, 71 Idaho 306, 230 P. 2d 998

Bunn v. Hanson (Idaho), 103 Fed. 2d 685

Wiesenthal v. Abe Goff, 63 Idaho 342, 349, 120 P. 2d 248

Benjamin v. Dore, 47 Idaho 582, 586, 277 P. 565

In re Sullivan's Estate (Ariz.), 78 P. 2d 132,
137, 50 Ariz. 483

Baker v. Baker, 142 SW 2d 737

Wells v. Zenz, 83 CA 140, 256 P. 485

2 Bancroft's Probate Practice 296, Sec. 340

"Our probate laws were adopted from the California Code, and while we are not bound by the California decisions thereon, nevertheless, they are of high authority on the statutes construed."

Short v. Thompson, 56 Idaho 361, 375, 55 P.
2d 163, 169

Simons v. Davenport, 66 Idaho 400, 160 P.
2d 464

In re Reil's Estate, 211 P. 2d 407, 70 Idaho 64

Stafford v. Field, 70 Idaho 331, 218 P. 2d 338,
341, 20 P. 2d 670

Palpably and actually, such concealment constituted extrinsic fraud, not intrinsic.

"Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been kept in ignorance thereof, or has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time."

Westphal v. Westphal, 20 Cal. 2d 393, 126 P.
2d 107

Harkins v. Fielder (Cal.), 310 P. 2d 423, 428

We submit that Idaho law is not entirely limited to "local law" (so called by counsel), particularly when the equity powers of a federal court are here invoked.

We also submit that the foregoing decisional law is respectable, even though "local." What is "local law"? Is it not the decisions of the Idaho Supreme Court and the legislative enactments, commonly known as statutes? We respectfully submit all are to be taken into consideration.

It comes with poor grace from counsel for executrix who had published notice to creditors that they present claims against the estate immediately thereafter to complain of lack of proof or affidavit of what is an acknowledged fact, having concealed the date of first publication of notice to creditors. How can such an argument have any weight? (tr. pp. 14, 15) Why give *any* notice to creditors?

It ill behooves any fiduciary upon whom, of all persons, counsel for any non-resident creditor should be entitled to rely for accurate information, to conceal that very information when needed; and when requested in writing, to be heard to say: that inquiry should have been made of another lawyer, or "even a layman." (tr. p. 15)

Appellant's counsel did not ask fiduciary to "run errands" for appellant and thereby make her a "scapegoat." (Appellee's Brief, page 15)

IV. INCONSISTENCY BETWEEN THE DECISION OF THE IDAHO SUPREME COURT AND THE STIPULATION IS APPARENT.

(1) The statement in the decision obviously refers to the failure of appellant to present her claim within four months, not to the proviso of Sec. 15-604 Idaho Code. This proviso is still the law, although a proviso.

(2) The question is whether the claim was presented within the period prescribed by the statutory proviso, as much a part of the statute as the portion thereof referred to by the court.

“A claimant having no notice as provided in Chapter 6 by reason of being out of the state” has a right to present her claim “any time before decree of distribution is entered.”

We submit the following reading of the statute to clarify the version that appellant has in this regard:

“When (*ever*) it is made to appear by the affidavit of a claimant to the satisfaction of a court or a *judge* thereof that the claimant had no notice (to creditors) by reason of being out of the state, the claim may be presented at any time before a decree of distribution is entered.” (Italics ours)

Nothing is said about what court or what judge, but it is fair to assume that “the proper court” and a proper judge are referred to. The federal district court in lieu of the state district court, having general jurisdiction of this suit on a rejected claim, we respectfully submit, is “the proper court.”

V. APPELLANT DISCLAIMS MAKING ANY CHARGE THAT THE NOTICE REQUIRED BY IDAHO LAW IS UNREASONABLE.

(1) Scott v. McNeal (Appellant's Brief, p. 16) simply shows that constitutional due process is applicable in in rem proceedings, not to inject herein a new point as implied by counsel.

(2) In answer to appellee's contention that this appellant's contention is so "startling" (p. 17 Appellee's Brief) we call the court's attention to the very wording of the letter of February 9, 1956, which letter does not contain any rejection or any approval, formally or informally, of the creditor's claim. The Supreme Court did hold that the attorney "in substance" rejected the claim. This suit is brought on the rejected claim.

CONCLUSION

We, therefore, submit that this appellant presented her claim in time; that this appellant, a non-resident creditor, absent from the state at all times in question, had no notice "by reason of being out of the state." That in substance qualifies this creditor to "present" her claim to the personal representative "at any time before decree of distribution." The claim was so presented and ignored.

We also respectfully submit that the concealment of the date of first publication of notice to creditors, when specifically requested by such crippled, disadvantaged, or disabled, appellant-creditor, consti-

tutes extrinsic fraud, since the creditor-appellant was thereby deprived of her traditionally American opportunity for her day in court on the facts of her case by filing her affidavit which she filed in the probate court promptly after discovery of the need therefor; appellant assails for fraud, directly, and not collaterally, the decree of distribution.

Harkins v. Fielder, 310 P. 2d 423, at 429 (11)
(Calif.)

We, therefore, respectfully urge that this independent suit definitely calls for a trial, not only of the statutory action on the rejected claim, but of the question of extrinsic fraud, and the logical need for a trusteeship to be impressed upon the estate, or any part thereof in the hands of appellee individually.

Dated at Boise, Idaho, March 27, 1958.

Respectfully Submitted,

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No. 15,801

IN THE

United States Court of Appeals
For the Ninth Circuit

GLADYS E. LINCOLN GRAMM,
Appellant,

VS.

ELIZABETH LINCOLN, Executrix of the
Last Will and Testament of Henry
Lincoln, Deceased,
Appellee.

Appeal from the United States District Court for the
District of Idaho, Southern Division.

APPELLEE'S BRIEF.

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Appellee.

**Appeal from the United States District Court for the
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APPELLEE'S BRIEF.

JURISDICTION.

Appellee accepts the statement of jurisdiction so far as it permitted the lower Court to consider this matter by reason of diversity of citizenship. However, it is felt that the matters raised in this cause of action lie exclusively within the jurisdiction of the State Courts of Idaho, having previously been considered and passed upon by all of the Courts of the said State, including the Supreme Court of the State of Idaho in the matter entitled *Gladys E. Lincoln*

Gramm v. Elizabeth Lincoln, Supreme Court Idaho, 312 Pac. 2d 113 (reproduced in T.R. pages 30 to 38). In this connection the Constitution of the State of Idaho, Article V, Section 21, provides that "the probate Courts shall be Courts of record and shall have original jurisdiction in all matters of probate . . ." and the Idaho codes at Section 1-1202(7) provide that "the Probate Court has jurisdiction . . . to order and regulate all distributions of property or estates of deceased persons".

STATEMENT OF THE CASE.

(A) History of Court Action.

This case began as a proceeding instituted by appellant in the Probate Court of Ada County, Idaho, by petition to vacate and set aside the decree of final distribution entered in said estate (T.R. p. 54, Para. XIV of Pretrial Stipulation). Appellant's petition was denied by the Probate Court and on appeal to the Idaho District Court the decision was affirmed. Whereupon appellant appealed to the Idaho Supreme Court which affirmed the order of the District Court (T.R. pp. 30-38).

While the appeal from the decree of final distribution was pending in the Idaho District Court, this case was filed in the lower Court under 15-609 of the Idaho Code.

After thus failing three times in the state Courts to overthrow the decree of final distribution by peti-

tion and appeal, appellant now seeks to set it aside by a collateral attack.

The appeal herein is from an order of the lower Court dismissing appellant's request for permission to file an amended complaint suing appellee in her individual capacity as well as in her representative capacity as executrix of her husband's estate. Both causes of action in the proposed amended complaint are based on the same facts and are actions at law brought pursuant to 15-609 of the Idaho code. The first cause of action seeks to recover judgment upon a creditor's claim against appellee as executrix of her husband's estate, the same cause of action as is stated in the original complaint. The second cause of action in the proposed amended complaint is grounded on the same facts and denominated "unjust enrichment". No claim for "unjust enrichment" has ever been presented to appellee either individually or otherwise.

(B) Statement of Facts.

Appellant lodged with appellee her alleged creditor's claim after the time limited for the presentation of such claims and did not obtain an order of the Probate Court extending the time for the presentation of claims. She did not even apply for such an order until long after the decree of final distribution had been made and entered (T.R. pp. 54-55, Para. XIII and XV of Pretrial Stipulation).

Appellant did not make any objection to the first and final account or the petition for final distribution filed in the Probate Court. She did not appear in said

Court personally or by counsel, until long after the decree of final distribution had been entered, although under Idaho Code 15-1118 it was incumbent upon appellant to appear in the Probate Court and file her objections to the first and final account and petition for final distribution.

The facts of this case are set forth in greater detail in the Pretrial Stipulation (T.R. pp. 46-57).

ARGUMENT.

I. CREDITORS' CLAIMS MUST BE TIMELY PRESENTED.

- (1) **Claims Against Estates Must Be Presented or Sued Upon in Such a Way and at Such Time as Required by Local Law, Otherwise They Are Barred.**

Under the law governing the administration of decedents' estates there are stated conditions when an executor or administrator must, perforce, disallow a claim. Section 15-604 Idaho Code, quoted at p. "d" of appellant's brief, compels an executor or administrator to disallow any claim not timely presented, although it does permit the probate judge, for good cause being shown, to order an extension for presentation if such extension is requested before a decree of distribution is entered.

Another condition appears in Section 15-610 Idaho Code, which states, in part:

"No claim must be allowed by the executor or administrator, or by the probate judge, which was barred by the statute of limitations, at the time of the death of the decedent . . ."

Under that statute neither the personal representative nor the probate judge can allow such a claim, but must disallow it. Section 15-609 Idaho Code states:

“When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after notice of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is forever barred.”

Where a claim, otherwise valid, must be rejected or disallowed by the executor or administrator, or by the probate judge, because of a statute of limitations, any rejected claimant might argue that the decedent, his estate, or an heir has been enriched—whether justly or unjustly. Precisely the same argument could be made in an action brought on a rejected claim six months or six years after notice of its rejection. But any such action must be brought against the executor or administrator, and within the period limited by statute, and not against any heir or heirs who might, *arguendo*, have been enriched by the amount of the rejected claim. The right to an action on a rejected claim is given and fixed by statute; it is a legal, not an equitable, action, and is exclusive.

(2) The Cases Relied Upon by Appellant Fail to Support His Argument, Nor Do They Substitute a Theory of "Unjust Enrichment" for the Legal Requirements Respecting the Presentation of Creditors' Claims.

If appellant's argument of unjust enrichment is sound, a suit in equity could be brought at any time, against any heir or heirs, and without any antecedent bother of filing a creditor's claim with an executor or administrator. It requires no considerable imagination to envisage what a shambles that theory would make of the orderly administration and distribution of decedents' estates, and of the statutes governing such administration and distribution, including the several statutes of limitation involved.

Because appellant has, at p. 15 of her brief, cited some Idaho cases in support of the unjust enrichment argument, we feel obliged briefly to discuss them. *Hixon v. Allphin*, 281 P. 2d 1042, 76 Idaho 327 (1955), related to restitution under a defaulted contract. *Madison v. Buhl*, 8 P. 2d 271, 51 Idaho 564 (1932), permitted the ward of a deceased guardian to bring an action against the heirs of his estate when, as distributees, they had received, as a part of his estate, the trust property properly belonging to the ward. The Court also reannounced the rule that it was unnecessary for the ward to file a creditor's claim for the simple reason that the property held by the decedent as trustee was no part of his estate. In *In Re Isaacson's Estate*, 285 P. 2d 1061, 77 Idaho 12 (1955), the lower Courts had held that a joint will created an irrevocable contract and rendered invalid a purported later will revoking his joint will, and that these

issues could be litigated in the Probate Court upon the offer of the subsequent will for probate. The Supreme Court reversed, holding that the Probate Court was without jurisdiction to litigate those issues.

At p. 21 of appellant's brief, three Idaho cases are cited to support the proposition that appellee owed some duty to appellant to see that appellant presented her claim in time. If there is such a rule the cited cases do not support it. *Burns et al. v. Skogstad*, 206 P. 2d 765, 69 Idaho 227 (1949), was a suit in equity to impress a trust upon the property of a deceased executor. The executor had fraudulently deceived the residuary legatees, not creditors, of the estate. *Gerlach et al. v. Schultz*, 244 P. 2d 1095, 72 Idaho 507 (1952), also was a suit in equity to impress a trust upon the property distributed to Schultz, who was also administrator of the estate, upon his petition alleging that he was the decedent's sole heir. Schultz' fraud not only was practiced on the Probate Court in alleging in his petition for final distribution that he was the sole and only heir, but he fraudulently deceived the other and nonresident heirs by informing them that the decedent left no estate. *Simonton v. Simonton*, 193 P. 386, 33 Idaho 255 (1920), did involve a creditor's claim. The claim was rejected by the administratrix, and proceedings were commenced against the administratrix in her representative capacity, and against her personally, on two causes of action in the same complaint. One cause was to compel the administratrix "to account for and inventory certain property alleged to belong to the estate and

not included in the inventory, and which she claims as her own, and to determine the title thereto. The second cause of action is to recover judgment on a claim which had been presented to the administratrix and disallowed. . . .” There was no question as to the timeliness of presenting the claim.

It was contended further in the *Simonton* case that the causes of action were improperly joined, for the reason that the first was against the administratrix as an individual, and the second was against her in her representative capacity. To this the Court said:

“The position is not well taken. In reality the complaint states but one cause of action. The action, although arising out of a probate proceeding, is in principle essentially a creditor’s bill in which appellant is seeking to establish the fact that she is a creditor of the estate and at the same time to reach funds which she claims should be subjected to the payment of the debt. In such a proceeding it is proper that respondent be made defendant, both as an individual and as administratrix of the estate of a deceased person.”

The Court further noted that:

“We are here called upon to decide only the question whether the creditor *under such circumstances as exist in this case* where the administratrix is adversely claiming property which the creditor alleges belongs to the estate may maintain the action, and this question we decide in the affirmative.” (Emphasis added.)

In the instant case appellant does not claim that appellee is adversely claiming property allegedly be-

longing to the estate, but does claim that appellee has been unjustly enriched as distributee of the property of the estate because appellee, as executrix, did not pay appellant's alleged claim, and that the Probate Court did not order the payment of said claim, regardless of the statutory admonition both to appellant and the Probate Court. The circumstances here do not remotely compare to the circumstances appearing in *Simonton v. Simonton*, supra, and which, the Court explicitly stated, were the only circumstances upon which its decision rested.

None of the Idaho cases cited by appellant support her argument of unjust enrichment, nor do they suggest any departure from the statutory requirements that creditors' claims be timely presented. Appellant's cause of action and her proposed second cause of action constitute, essentially, a creditor's claim against the estate. The controlling statutes and decisions are those relating to, and interpreting, the presenting of creditors' claims; and none of these supports or gives any nourishment to appellant's arguments of unjust enrichment.

II. THE DECISION OF THE IDAHO SUPREME COURT GOVERNS IN THIS MATTER.

(1) This Action Is an Attempted Collateral Attack on the Final Decision of the Idaho Supreme Court.

Appellant's proposed amended complaint was offered after the decision of the Idaho Supreme Court, 312 P. 2d 113 (T.R. pp. 30-38), and the second

cause of action pleaded therein was an attempt to get around the finality of that decision. This second cause of action is nothing more than a collateral attack on the order of the Probate Court (See par. V of the second cause, at p. 42 of transcript of record).

In its decision, *supra*, the Idaho Supreme Court said:

“Probate courts are courts of record with original jurisdiction in all matters of probate and settlement of estates of deceased persons, Idaho Const. Art. V. Sec. 21, and their orders and judgments in regard to such matters cannot be collaterally attacked and can be reviewed only by proper motion in such courts or by appeal from their decisions.” (See p. 36 of Transcript of Record.)

In *O’Neill v. Potvin*, 13 Idaho 721; 93 P. 257, a collateral attack upon a judgment is defined:

“The attack is collateral if the action or proceeding has an independent purpose and contemplates some other relief or result than the mere setting aside of the judgment, although the setting aside of the judgment may be necessary to secure such independent purpose.”

The case of *Flynn v. Driscoll*, 38 Idaho 545; 223 P. 524, is an exhaustive study of the probate law of Idaho. It holds that suit on a rejected claim under 15-609 Idaho Code, if it be a demand for money, is an action at law, affirming the decision of the Court on that point in *Idaho Trust Co. v. Miller*, 16 Idaho 308; 102 P. 360. It further holds, *inter alia*:

“Probate law is a creature of statute. Each point thereof is governed by the statute in force in the particular state, and little aid can be gained from text writers or from decisions of other states where the statutes are not identical, or at least analogous.”

We submit that the state Court has disposed of both causes of action in appellant's proposed amended complaint, on the merits and on the law, and that the order of the lower Court, here, was and is correct and proper. This appeal, therefore, should be dismissed.

(2) The Decision of the Idaho Supreme Court Was Properly Based on Local Law, Which Controls in This Case, and Is Final and Conclusive.

On page 15 of appellant's brief it is contended that the decision of the Idaho Supreme Court is not res judicata. The reasons assigned for the contention are not convincing. Regardless of the vantage point from which one examines it, the decision confirms or establishes the local law, and we are proceeding upon the theory that this Court will follow the local law.

In that respect we invite the Court to note the language of the Idaho Statute barring belated claims (15-604, Idaho Code). The statute provides that a claim not presented within the time *limited in the notice to creditors* is barred forever. The statute does not provide that a claim not presented before the *decree of distribution is entered* is barred. Neither does the proviso. The proviso is construed and expounded by the Supreme Court in *Penn Mutual Life Ins. Co. v. Beauchamp*, 57 Idaho 530; 66 P. 2d 1020.

A belated claim of a non-resident creditor is of no validity unless its presentation be preceded or accompanied by an order of Court permitting it to be presented. Under 15-607 Idaho Code only claims that are *presented* to the executor or administrator need be acted upon by him. A belated claim is a nullity, having no more validity than a blank sheet of paper, which the personal representative is free to ignore. Even if timely presented it need not be acted upon for sixty days, and if it is rejected it need not be reported to the Probate Court. Under 15-1116 Idaho Code notice must be given, by posting or publication, as the Court may direct, and for such time as may be ordered, of the hearing for a final settlement, and under 15-1118 Idaho Code it is provided:

“On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account and contest the same.”

Under 15-604 Idaho Code a personal representative has no authority to pay claims presented after the time limited for their presentation has expired.

Schneeberger v. Frazer, 36 Idaho 737; 213 P. 568;

Flynn v. Driscoll, 38 Idaho 545; 223 P. 524;

Lundy v. Lemp, 32 Idaho 162; 179 P. 738;

Blake v. Lemp, 32 Idaho 158; 179 P. 737.

The burden of appellant's complaint is that she did not receive justice in the state Courts because the Probate Court is not a court of general equity juris-

diction. The assumption, it is thought, is a non sequitur.

The Probate Court, under 5-905 Idaho Code, had exclusive jurisdiction to make and enter the decree of final distribution and to correct said decree, if warranted, by vacating and setting it aside or refusing so to do, either upon a timely motion being made, or by appeal.

Horn v. Cornwall, 65 Idaho 115; 139 P. 2d 757;

Snow v. Probate Court, 60 Idaho 611; 95 P. 2d 844;

Moyes v. Moyes, 60 Idaho 601; 94 P. 2d 782.

Both the motion to vacate and the appeal from the decree were grounded upon the same alleged errors as those specified in appellant's motion to amend the complaint. The Probate Court had jurisdiction to hear and determine those matters, and its decision was affirmed by the State District Court and the Supreme Court.

"While probate courts are not courts of general equity jurisdiction, yet, in matters falling within their jurisdiction they possess many of the powers usually exercised by courts of equity."

21 C.J.S. Sec. 302, p. 542.

"The jurisdiction conferred . . . is statutory and yet all probate matters are equitable in their nature."

Walker v. Cook, 128 N.E. 584; 294 Ill. 294.

The appellee's position may be stated to be that the decision of the Supreme Court is right, but whether

right or wrong it is final and conclusive, and appellant is bound by it. Therefore, we shall spend very little time defending the decision. We shall confine our argument largely to showing that what the appellant undertook to accomplish in the lower Court was, under the guise of an amendment, a retrial of the matters decided against her by the state Courts.

It is important to remember in connection with this matter that:

“No principle is more firmly settled than that equity will not come to the aid of one who, through his own delay and own fault, has lost the remedy which the law provided.”

DeMattos v. McGovern, 25 C.A. 2d 429; 77 P. 2d 522.

III. APPELLANT CANNOT CLAIM TO HAVE BEEN MISLED BY MR. PAINE'S LETTER OF FEBRUARY 9, 1956.

The next point that appellant labors is that she was misled by a letter (T.R. pp. 51-52) which deceived the Probate Court and the appellant to her prejudice. We cannot say that appellant was not deceived or misled by the letter, but we can say that the charge is an insult to appellant's intelligence—that the letter was not calculated or likely to deceive any ordinary person, or even an infant. The point is stressed by appellant as though appellee had withheld information from her that was peculiarly within the knowledge of appellee, whereas the notice to creditors was

published in a Boise newspaper pursuant to an order of the Probate Court. The desired information could have been had in an hour through the offices of local counsel or even a layman. Instead appellant chose to make appellee run errands for her.

The repeated attempts of appellant to make a scapegoat of appellee by blaming her for appellant's negligence in the face of the letter and the decision of the Supreme Court further exemplifies, it is thought, that necessity knows no law.

IV. THERE IS NO INCONSISTENCY BETWEEN THE DECISION OF THE IDAHO SUPREME COURT AND THE PRETRIAL STIPULATION.

Appellant's specification of error No. XII is to the effect that the Supreme Court's decision contradicts the stipulation of facts (T.R. pp. 46-58) in this: That according to the stipulation the alleged claim was *presented* ten days before the decree of distribution was entered, whereas, the decision of the Supreme Court rules that "neither the affidavit mentioned in the section, nor claim was presented in this case within the time prescribed." The two statements are neither inaccurate nor contradictory. The question is not whether the claim was presented before the decree of distribution was entered, but whether it was presented before the time limited in the notice to creditors for the presentation of claims.

The last sentence of the specification, namely, that the time for filing an affidavit is not definite is a mere quibble. The provision is that the requisite affidavit must be filed before the decree of distribution is entered. The decision correctly states that neither was the order applied for nor was the claim presented within the time prescribed.

V. NO SHOWING HAS BEEN MADE THAT THE NOTICE REQUIRED BY IDAHO LAW FOR THE PRESENTATION OF CREDITORS' CLAIMS IS UNREASONABLE OR IS A DENIAL OF DUE PROCESS.

On page 16 of appellant's brief it is argued that the notice provided by the statutes of Idaho for in rem proceedings is insufficient and unreasonable. What notice is referred to, and why it is deemed insufficient or unreasonable, is not stated. To the best of our knowledge the statutes involved are part of the local law. However that may be, appellant had more than constructive notice of the proceedings of which she complains; that notice was provided by the correspondence had between her and the Probate Judge (T.R. pp. 47-48).

In *Chandler v. Probate Court*, 26 Idaho 173; 141 P. 635, the Idaho Supreme Court rules:

“* * * it was incumbent upon the petitioner, who, in common with everybody else, had the only notice of the hearing on the petition for final settlement which was required by law, * * * to

appear in the probate court and file their exceptions or make their objections. * * * They knew whether or not they were going to dispute the action of the administrator in failing to allow their claim; they knew that the settlement of the estate was pending in the probate court; they had statutory notice of the petition for final settlement. Under these circumstances their failure to keep track of the proceedings and file their exceptions was such a failure to protect themselves in the way provided by law as constitutes laches, * * *"

Section 5600, Revised Codes, cited in *Chandler v. Probate Court*, supra, pp. 637-8, is now 15-1118 Idaho Code.

At page 16 of appellant's brief it is asserted that no action was taken on appellant's alleged claim, "either by allowance or rejection thereof." This is a rather startling contention in view of the decision of the Supreme Court and the allegation in appellant's complaint herein: "That on the 9th day of February, 1956 defendant (appellee), as such executrix, rejected plaintiff's (appellant's) said claim" (T.R. pp. 4-5).

CONCLUSION.

For the above stated reasons, we submit that principles of unjust enrichment cannot apply, that the final decision of the Idaho courts is correct and determines the result in this case and that there has been no fraud or violation of due process. Accord-

ingly, the action of the lower court herein should be upheld.

Dated, San Francisco, California,
February 24, 1958.

Respectfully submitted,

KARL PAINE,

JOSEPH N. LEGGAT,

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By KARL PAINE,

Attorneys for Appellee.

IN THE
United States
Court of Appeals
For the Ninth Circuit

GLADYS E. LINCOLN GRAMM,

Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, Deceased,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
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and

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FILED

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JOHN E. HUBBEN, C.

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CONSTITUTION AND STATUTES

U. S. CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1.— . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

“JURISDICTION — ORIGINAL AND APPELLATE.—The district court has original jurisdiction:

1. In all cases both at law and in equity. * * *”
Sec. 1-705 Idaho Code.

“TIME FOR PRESENTING CLAIMS. — The time expressed in the notice must be four months after its first publication.” Sec. 15-602 Idaho Code.

“BAR OF CLAIMS NOT PRESENTED WITHIN TIME LIMITED. — All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever: *provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or a judge thereof, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.*” Sec. 15-604 Idaho Code. (Italics are ours.)

“ALLOWANCE OR REJECTION OF CLAIMS. — When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator he must, within sixty days after its receipt, indorse thereon, his allowance or rejection, with the day and date thereof. If he allows the claim, he must within the same time present it to the probate judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. *If the executor, administrator, or judge reject the claim, or disallow any part thereof, he shall within ten days thereafter notify the claimant, his agent or attorney, by mail or personal notice of such rejection or disallowance. If the claim be presented to the*

executor or administrator before the expiration of the time limited for the presentation of claims the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time." Sec. 15-607 Idaho Code. (Italics are ours.)

“ACTIONS BY AND AGAINST EXECUTORS.
—Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and *against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.*” Sec. 15-803 Idaho Code. (Italics are ours.)

“SUIT ON REJECTED CLAIM.—When a claim is rejected either by the executor or administrator, or the probate judge, *the holder must bring suit in the proper court against the executor or administrator, within three months after notice of its rejection,* if it be then due, or within two months after it becomes due, otherwise the claim is forever barred.” Sec. 15-609 Idaho Code. (Italics are ours.)

“FINAL DECISIONS OF DISTRICT COURTS.
The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court

for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." Sec. 1291, Title 28 USCA.

"CIRCUITS IN WHICH DECISIONS REVIEWABLE. Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; * * *" Sec. 1294, Title 28 USCA.

"DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY. (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States:" Sec. 1332, Title 28 USCA.

IN THE
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For the Ninth Circuit

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Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Last
Will and Testament of Henry Lincoln, Deceased,
Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Idaho, Southern Division*

I. JURISDICTION

This Honorable Court of Appeals has jurisdiction of this appeal by reason of Sec. 1291 and 1294, Title 28, U.S.C.A.

The United States District Court for the District of Idaho, Southern Division, has jurisdiction of this suit under Sec. 1332, Title 28, U.S.C.A., in lieu of the state district court by reason of diversity of citizenship and amount involved alleged in com-

plaint, pp. 3, 4, 5, and 6; amended complaint, pp. 39, 40, 41, 42, 43, and 44; Pretrial Stipulation, pp. 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58; and reply to affirmative defense, pp. 19, 20, 21, 22, 23, and 24.

Also: Under Sec. 1-705 Idaho Code: "The district court has original jurisdiction . . . in all cases both at law and in equity . . ." and *Gallivan v. Jones*, 42 C.C.A. 408, 102 Fed. 423; also: Sec. 15-609 Idaho Code.

II. INTRODUCTORY SUMMARY

Under Rule 15(a), appellant is entitled to file her amended complaint whereby she seeks allowance of her non-resident creditor's claim as having had no actual notice, though such knowledge of the date of the first publication of the Notice to Creditors was requested, from the executrix and the unquestioned fact that appellant's claim was filed before the decree of distribution as allowed by statutes: Section 15-604 Idaho Code, and Section 15-607 Idaho Code.

The U. S. District Court for Idaho had jurisdiction because of diversity of citizenship and amount involved being over \$3,000.00.

The executrix occupied a fiduciary position towards appellant and violated such duty by failing and refusing, when requested by appellant, to tell appellant the first date of publication of Notice to Creditors.

The decision of the State Supreme Court (In re Lincoln's Estate, 312 Pac. 2d 113) on appeal from

the Probate proceedings, is not *res adjudicata* because the parties and issues herein are not the same, appellee being sued in equity in her individual capacity, for unjust enrichment, extrinsic fraud, and violation of her fiduciary duty as executrix, the State Probate Court being without equity jurisdiction.

Also, that a trust should be impressed upon the funds of the estate distributed to appellee and as a suit for specific performance of the agreement sued on, or quasi-specific performance, it was unnecessary for appellant to file a claim.

If it was necessary to have filed a claim, suit thereon had to be in an independent action, which was not and could not have been encompassed in the preceding State appeal. Appellant seeks herein due process by a consideration of her claim on the merits as guaranteed by law. U. S. Constitution, 14th Amendment, Sec. 1.

III. STATEMENT OF PLEADINGS AND FACTS

Plaintiff and deceased, Henry Lincoln, then husband and wife, separated about 1937. Plaintiff was then, ever since has been and now is a resident of California. p. 46.

On March 2, 1937, Henry Lincoln obtained a divorce in Clark County, Nevada, from plaintiff on substituted service. Subsequently, both parties married, but not to each other. p. 46.

On September 14, 1938, plaintiff and deceased duly and regularly made a property settlement agreement wherein, among other provisions, deceased Henry Lincoln, agreed to pay plaintiff \$125.00 per month during the rest of his natural life. p. 46. The agreement further provided "that the said parties hereto hereby accept the considerations moving to each of them under this agreement as a full and complete settlement of all property rights, and each party agrees to accept as a complete settlement of all his or her right to alimony, maintenance, attorney's fees and costs," p. 47, and "that this agreement is not made and shall not be construed as an agreement for or in aid of any divorce and that it is to remain in full force and effect whether the parties continue with the relation of husband and wife, or such relations may hereafter be dissolved for any cause whatever." p. 47.

Deceased, Henry Lincoln, never paid anything on this contract and died testate August 17, 1955, being then a resident of Boise, Idaho. p. 47.

Defendant, Elizabeth Lincoln, deceased's wife at the time of his death was, pursuant to the provisions of the Will, duly and regularly appointed executrix. p. 47.

On December 29, 1955, Joseph Shane of Los Angeles, California, attorney for the plaintiff, wrote the Clerk of the Probate Court, Ada County, State of Idaho, specifically asking if the Henry Lincoln Estate were then and there pending, pp. 47, 48. The Probate Court's answer did not specify the date

for presentation of claims, but did state that the estate was in the process of probate, p. 48. On February 6, 1956, plaintiff's attorney wrote appellee as executrix, c/o Karl Paine, her attorney, at the place designated for the presentation of claims, asking specifically for the date of first publication of the notice to creditors in order that the appellant might act, if necessary, as a non-resident creditor having no notice as provided in Chapter 6, Title 15, Idaho Code, Sec. 15-604, pp. 49, 50.

The attorney's answer did not give this information and expressly declined to give this or any information. p. 51.

On February 6, 1956, appellant presented her claim by letter from her attorney to respondent's attorney at the place designated for the presentation of claims, two days before respondent filed her first and final account and petition for distribution of the estate, February 8, 1956. On February 9, 1956, respondent's attorney acknowledged receipt of the claim. pp. 49, 50, 51, 52.

On March 16, 1956, appellant petitioned the Probate Court to vacate and set aside the decree of settlement and final distribution on the ground that respondent had falsely represented to the Court that all the debts of said deceased and his estate had been fully paid, whereas neither the decree nor the petition for distribution disclosed the filing of appellant's claim, which had been presented prior to the decree of distribution, and the appellee's affidavit stated none was presented. p. 54.

On April 5, 1956, appellant petitioned the Probate Court of Ada County, State of Idaho, for an extension of time for filing her creditor's claim by reason of appellant being out of the State, and having had no actual notice, directly or indirectly, of notice to creditors in the estate, praying for an order of the court extending time for filing of creditor's claim presented February 7, 1956, (erroneously shown as February 17, 1956. p. 55) and that defendant as executrix be ordered by the court to reject or allow and act upon her claim. This petition was accompanied and supported by affidavits of plaintiff and her attorney, Joseph Shane, and contains a statement that she was a non-resident of the State of Idaho and had no actual notice of the first publication of notice to creditors. No countershowing was made. Therefore, the non-residence and lack of actual notice of the first, or any, publication of notice to creditors are clearly established facts. p. 55.

A general demurrer, motion to strike and motion to overrule the above petition were interposed by respondent on the ground substantially that appellant's claim had not been filed within time, that is, within four months of the first publication of notice to creditors and that plaintiff had not applied to the Probate Court to extend the time for the presentation of claims and no order had been made relative thereto. p. 55.

The Probate Court sustained the Demurrer, Motion to Overrule and Motion to Strike as did the District Court of the Third Judicial District, Ada

County, State of Idaho, on appeal to said Court. pp. 55, 56. At the trial in the District Court further evidence was adduced to the effect that plaintiff was a non-resident of the State of Idaho, and had no actual notice of the first publication of Notice to Creditors, notice required by statute, as to when claims had to be filed, p. 56, under Sec. 15-602 Idaho Code, as a matter of fact as well as law.

Upon appeal to the Supreme Court of the State, it affirmed the action of the District Court, affirming the action of the Probate Court.

On May 5, 1956, appellant filed this suit in the District Court of the United States in the District of Idaho, Southern Division, as a suit on a rejected claim though the claim had never been, as such, rejected by the executrix, the record clearly showing two sustaining jurisdictional requirements, namely: diversity of citizenship and amount over \$3,000.00. p. 46.

On July 23, 1957, appellant filed her amended complaint. p. 66.

On August 16, 1957, appellant lodged proposed amended complaint which is almost identical with but alleging a different date of contract than amended complaint actually filed on July 23, 1957. p. 66.

“A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so

amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Federal Rules of Civil Procedure, Rule 15(a).

The above detailed facts are clearly shown without deviation or contradiction in the stipulation of facts filed herein, p. 46, except the typographic error in date of presentation. p. 55.

IV. SPECIFICATIONS OF ERROR

Appellant specifies as error that the learned trial court, by its order dated August 27, 1957, p. 66:

I

Erred in denying appellant's motion for leave to file her amended complaint thereby denying the Federal District Court's broad equity jurisdiction as the competent tribunal for trial of this suit and amendment under 15(a), Federal Rules of Civil Procedure.

II

Erred in refusing to exercise equity jurisdiction for specific performance of the agreement sued upon since the state probate court was wholly without

equity jurisdiction. In re Isaacson's Estate, 77 Idaho 12, 285, P. 2d 1061, Key No. Courts 2001 $\frac{1}{4}$.

III

Erred in denying liability of appellee for unjust personal enrichment while withholding information specifically requested by a non-resident creditor, who had not received the notice or any notice to creditors provided by Chapter 6, Title 15, Idaho Code, being the notice to creditors referred to in Sec. 15-604 Idaho Code, and 15-607 Idaho Code, by reason of being outside the state of Idaho.

IV

Erred in not giving proper and complete consideration to the acknowledged fact that the claim had been actually presented prior to the decree of distribution in the Henry Lincoln Estate. pp 51, 52. Secs. 15-604 and 15-607 Idaho Code (last sentences).

V

Erred when it failed to recognize the equitable jurisdiction created through the probability that appellant, as the former wife, does not necessarily have to present her claim at all since the agreement sued on was made in consideration of the duty of support owed by decedent and upon her entire relinquishment of her entire property rights, it was entitled to performance. Ashbauth v. Davis, 71 Idaho 150, 227 P. 2d 951; 32 A.L.R. 2d 361; 21 Am. Jur. 96, Sec. 79, Notes 9, 19; Toulouse v. Burkett, Admr. 10 Pac. 26, 2 Idaho 184.

VI

Erred in due process of law, in violation of the Federal Constitution, in that appellant did not have any notice of the time within which claims had to be filed, although she had filed her claim and had become thereby an interested party at the time of the letter dated February 9, 1956, nine days prior to the date of decree of distribution and appellant was thereby unfairly denied recourse and equal treatment and protection under Sec. 15-604 and 15-607 Idaho Code, and guaranteed by the 14th Amendment, U. S. Constitution, Sec. 1.

VII

Erred in depriving appellant of her remedies, at law and in equity, by treating the Idaho Supreme Court decision *In re Lincoln's Estate*, 312 P. 2d 103, 79 Idaho, as determinative of all issues herein when that Honorable Court's opinion and decision had the effect, in this regard of merely denying appellant a plain, speedy and adequate remedy at law on that appeal concerning only the procedural law of the State of Idaho in probate matters, when there were no issues before that court on the several questions presented in this plenary suit in equity.

VIII

Erred in failing and refusing to hear on its merits the complaint of appellant, as amended, containing allegations of unjust enrichment of appellee, and specific performance.

IX

Erred in failing and refusing to consider the allegations of fraud raising the question of the competency of that Federal District Court to impress upon the estate in the hands of the distributee a trust in favor of appellant.

X

Erred in failing to take into consideration the fact that notice of rejection of the creditor's claim of appellant was never given in writing, or at all, by the executrix as required by Sec. 15-607 Idaho Code, thus depriving appellant of her right to file her affidavit under Sec. 15-604 Idaho Code before decree of distribution.

XI

Erred in failing to assume and exercise the full inherent equity powers of the Federal District Court as the proper and competent tribunal sitting in chancery, in lieu of the State District Court, on these allegations.

XII

Erred in failing to recognize the contradiction between facts stated in the pretrial stipulation and facts as stated in the Supreme Court's decision in the matter of presentation of the claim within the time allowed by Section 15-604 Idaho Code, since the statement of facts shows that the claim was presented ten (10) days before the decree of distribution was entered. p. 51. The Supreme Court decision on page 115, second column: "Neither the

affidavit mentioned in the section nor claim was presented in this case within the time prescribed." Sec. 15-604 Idaho Code (last sentence) does not prescribe any definite time at all for the filing of the affidavit referred to therein and grants absent claimants any time before decree of distribution in which to file creditors' claims.

XIII

Erred in failing to contra-distinguish between statutory provision in Sec. 15-604 Idaho Code relating to creditors "who have had no notice by reason of being out of the state" and the Supreme Court's decision in *re Lincoln's Estate* that "a non-resident creditor desiring to present a belated claim should apply for an order before the decree of distribution is entered," since the statute provides merely: "may be presented at any time before a decree of distribution is entered." Appellant's claim having been so presented, was presented in time.

XIV

Erred in failing to uphold the extremely high fiduciary duty owing by a fiduciary to out of state creditors without notice as provided in this chapter by reason of being out of the state, whereby this appellant was laboring under the very great disadvantage "out of the state."

V. ARGUMENT

This is a plenary suit in equity bottomed upon appellant's right to specific performance of the property settlement agreement sued upon and to impress a trust upon any estate in the hands of the distributee

resulting from her unjust enrichment in withholding from appellant the vital date of first publication of notice to creditors, which amounted to constructive fraud.

The record clearly discloses: (1) That the claim of appellant was presented ten days before the decree of distribution was entered, leaving ample time for her to file the requisite affidavit of lack of notice by reason of her absence from the State of Idaho, her non-residence, and her having no notice of the date of first publication of notice to creditors. (2) Specific request by appellant's attorney. (3) Refusal of appellee's attorney to give this or any information. (4) That appellant is a non-resident having no actual notice or knowledge of the first publication of notice to creditors by reason of being out of the state. pp. 49, 51, 52, 53, 54, 62, 63.

The last day for presentation of claims was January 29, 1956. The claim was presented February 7, 1956. At the time of presentation of the claim, the final account and petition for distribution stating all claims had been paid, were either filed or in the process of being filed, the same having been filed on February 7, 1956. The estate was still open and alleged in condition to be closed, but no actual notice of rejection of the claim had been given as required by Sec. 15-607 Idaho Code, in writing. *Holt v. Michelson*, 41 Idaho 694, 242 P. 977.

Claimant, therefore, had no notice of the first publication of notice to creditors, nor any written notice of the rejection of her claim, nor any other

notice excepting only knowledge of the pendency of the estate of Henry Lincoln, deceased, in the Probate Court of Ada County, Idaho, the name of executrix, and the name and address of her attorney. p. 48. Knowledge of the essential date of first publication of notice to creditors was so material as to be indispensable. There is a long recognized principle that a person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact; but this appellant, through her attorney, had specifically requested the date when the first publication of notice to creditors was made. pp. 21, 49. Appellee's attorney responded, declining to give this or any information. pp. 21, 22, 51, 52. This was a clear breach of the legal and equitable duty which, irrespective of moral guilt, is, by law, declared fraudulent because of its tendency to deceive others.

In a well-reasoned decision, an out of state claimant who had learned of the death of his debtor but was entirely ignorant of the publication of notice to creditors, which he had never seen was held entitled to this much consideration. *Sterling v. Title Insurance and Trust Company*, 53 CA 2d 583, 128 P. 31. This is a most apropos case for consideration here, for the facts are similar, the main difference being in that appellant here has been both vigilant and diligent ever since discovery of the expiration date, January 29, 1956. p. 47.

The relationship between appellant and appellee is that of c' estui que trust, and fiduciary. *Burns v. Skogstad*, 206 P. 2d 765, 69 Idaho 227; *Wiesenthal v. Goff*, 120 P. 2d 248, 63 Idaho 342; *Larrabee v. Tracy*, 126 P. 2d 947, 951, Syl. 3-5.

Unjust enrichment is recognized in Idaho as the basis for such an action. *Hixon v. Allphin*, 281 P. 2d 1042, 76 Idaho 327; *Madison v. Buhl*, 51 Idaho 564, 8 P. 2d 271, 273. These equitable remedies were not available to appellant in the Probate Court. *In re Isaacson's Estate*, 77 Idaho 12, 285 P. 2d 1061.

Nor was the decision of the State Supreme Court *res adjudicata*. First, the parties are not the same, because herein the appellee is sued not only as executrix but as an individual. Second, the issues herein framed have never been before a court of general jurisdiction. *Miller v. Mitcham*, 21 Idaho 741, 123 P. 941; *Schodde v. U.S.* 69 F. 2d 866, WKS Judgment 713(3); *Melgard v. Moscow Idaho Seed Co.*, 251 P. 2d 546, 73 Idaho 265.

"While many courts have insisted and still insist that the doctrine or principle of the law of the case is good law and should be applied in all cases, there has been a considerable tendency, and probably a growing one, to make an exception where it clearly appears that the former decision was erroneous; and, as a consequence, there is respectable authority to the effect that a decision rendered on one appeal, if clearly erroneous, is not conclusive upon the court upon a subsequent appeal of the same case." 3 Am. Jur. 547.

Counsel for appellee not only expressly refused to give any information, but wholly failed to act upon the claim as such, either by allowance or rejection thereof, and made formally no objection to the claim either as to time of filing or as to form. pp. 51, 52, 53, 54. In the light of this record, it is obvious that an injustice has been done and that this non-resident creditor who had no notice of the date of first publication of notice to creditors, or any of the contents thereof, by reason of being outside the State of Idaho, was deprived of her day in court by lack of due notice. No judgment of a court is due process of law if rendered without jurisdiction of the court or without notice to the party. *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1107, 1112; *Roller v. Holly*, 176 U.S. 398, 208 S. Ct. 410, 44 L. Ed. 520.

That the question of the reasonableness of the notice provided for by state statute in in rem proceedings involves a vital element of due process, and that the decision of the state is not binding on the federal court, was held in *Scott v. McNeal*, 154 U.S. 34, 14 S. Ct. 1107, 1112, 38 L. ed. 896; also *Larrabee v. Tracy*, *supra*.

Extrinsic fraud is fraud or deception practiced upon a party by his adversary, which has prevented the former from trying his case, or from having a real contest of the subject matter, and all of the elements of actionable fraud must exist. *Keane v. Allen*, 202 P. 2d 1031, 70 Idaho 122; *Penn Mutual Life Insurance Company v. Beauchamp*, 57 Idaho 530, 66 P. 2d 1022, the Idaho case most nearly

approaching the situation here presented, we quote:

“When an application has been made by a creditor to present a claim against the estate of a decedent, after the expiration of the time limited in the notice for presentation of claims, supported by an affidavit containing statements, which, if true, justify the issuance of an order that such claim may be presented at any time before decree of distribution is entered, an order should be made permitting its presentation. If when presented it is rejected, an action may be commenced to establish the claim against the estate, and the executor or administrator may present any defense thereto he may have, including the statute of limitations contained in Sec. 15-604,” citing *Tropico Land and Improvement Company v. Landbourne*, 170 Cal. 33, 148 P. 206, and *U. S. Gypsum Company v. Shaffer*, 7 Cal. 2d 454, 16 P. 2d 998.

“One fundamental principle should be constantly kept in mind; . . . ‘equity jurisprudence’ . . . underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the powers and functions of the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrators does and must still exist, except so far and with respect to such particulars as it has been abrogated by express prohibitory, negative language of the statutes, or by

necessary implication from affirmative language conferring exclusive powers upon the probate tribunals." 3 Pomeroy's Equity Jurisprudence, 3rd ed., Sec. 1153, p. 2249.

Referring to an identical statute, the California Supreme Court, in *Cullerton v. Mead*, 22 Cal. 98 said: "This is a remedial statute, and it must, therefore, be construed liberally, and when the meaning is doubtful, it must be so construed as to extend the remedy."

And the Idaho Supreme Court has said: "It is the duty of courts so to construe statutes as to make them effect their evident purpose and harmonize their various provisions with one another, and when the application of these rules still leaves a question of doubt, the principles of Justice must determine the doubt." *Lamkin v. Sterling*, 1 Idaho 92.

A very enlightening discussion of the subject of notice is likewise found in *Larrabee v. Tracy*, 126 P. 2d 947, 951, which was affirmed on appeal in 134 P. 2d 265. "Equitable jurisdiction exists and will be exercised in all cases, and under all circumstances, where the remedy at law is not adequate, complete and certain, so as to meet all the requirements of justice. That there is a legal remedy is not enough; such remedy, in order to oust or prevent the equitable jurisdiction must be in all respects as satisfactory as the relief furnished by a court of equity." 1 Pomeroy's Equity Jurisprudence, 3rd ed. 515, Sec. 297, quoted with approval by the Supreme Court of Idaho, in *Coleman v. Jaegggers*, 85 P. 895, 897; 50

Am. Jur. 419, Sec. 393, Note 13; also, 21 Am. Jur. 886, Sec. 916, Notes 6, 16.

Turning, now, to the matter of constructive fraud: WKS, Fraud 6, 7, 10. Appellant contends this fraud was extrinsic: "Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud." *Rogers v. Stacy*, 318 P. 2d 1116, 1118.

"A court of equity under its general powers has the power to inquire into the account of an executor or administrator where some ground for the exercise of equitable jurisdiction such as fraud, misrepresentation, or mistake is clearly established provided the complaining party has exercised diligence, and is not guilty of laches. A delay of eight months after the entry of an order settling an administrator's account before bringing a suit in equity for relief as to require the denial of the relief sought." 21 Am. Jur. 685, Sec. 542. Here, appellant filed her claim ten days before decree of distribution was entered, but her claim was not considered on the final settlement of the estate. She thereupon appealed promptly within the period prescribed by law, but the state courts held that on appeal from the Probate Court, they could not consider any item not at issue in the Probate Court.

“There is an admitted exception to the general rule in cases where, by reason of something done by a successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client’s interests to the other side, these and similar cases which show that there has never been a real contest in the trial nor hearing of the case, are reasons for which a suit may be sustained to set aside the former judgment or decree, and open the case for a new and fair hearing.” *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Blood v. Templeton*, 152 Cal. 148, 92 P. 78, 13 LRA (NS) 579, 584.

The successful plaintiff in a suit for relief against extrinsic fraud in a procurement of a decree of distribution is allowed an equitable lien on the property which the defendant secured, if such property can be identified. *Purinton v. Dyson*, 8 Cal. 2d 322, 65 P. 2d 777.

Extrinsic fraud, which justifies a court of equity in setting aside a decree is one which prevents a party claiming to be injured from having a trial or

presenting all his case in court and does not apply to any matter which was actually presented and considered. *Van Gilder v. Warfields Unknown Heirs and Devisees*, 120 P. 2d 243, 246, 63 Idaho 328.

With this appellant, as creditor, and this appellee, as executrix, a positive duty rested upon the executrix to fully, fairly and frankly advise the court as to all facts and all information in her possession, particularly by reason of the disadvantage of non-residence of appellant and having no notice to creditors by reason of being out of the State of Idaho. *Burns v. Skogstad*, 69 Idaho 227, 206 P. 2d 765; *Gerlack v. Schultz*, 72 Idaho 507, 244 P. 2d 1095, 1098; *Simonton v. Simonton*, 33 Idaho 255, 193 P. 386.

“... equity is more liberal in its remedies than is law and often affords relief of a different character or under circumstances which the law will not recognize. 1 Story's Equity Jurisprudence (14th Ed.). 5. In relieving from fraud, courts of equity often go, not only beyond, but even contrary to the rules of law. Id. 261. In this case, adequate remedy of law being absent, the broad powers of equity will not be stayed and see injustice done merely because the fraud charged involved violation of a rule of court. Equity is too flexible for that.

“It matters little as to the mode or manner in which fraud is effected. A court looks to the effect and asks if the result is a consequence of fraud. For any description of mala fides practiced in obtaining a judgment, equity will grant relief.” 15 RCL 761.

“In general, it may be stated that in all cases where by accident, or mistake, or fraud, or otherwise a party has an unfair advantage in proceedings in a court of law which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using that advantage which he has thus improperly gained.” *State, ex rel Happel v. District Court*, 38 Mont. 166, 99 P. 291, 35 LRA (NS) 1098, 129 Am. St. Rep. 636.

Having answered the letter, containing the request for the specific information so vital to appellant's counsel, it became the legal and equitable duty of the fiduciary's counsel to answer the question with all frankness, candor, and fullness, even as such fiduciary client would be compelled to answer under those circumstances. Armed with the necessary affidavit that appellant had not received notice to creditors by reason of being out of the state of Idaho, appellant's counsel could have brought the claim to hearing.

Such failure to answer the inquiry amounted to a concealment of the most vital date of first publication of notice to creditors which is the notice referred to “as provided in this chapter,” the exact information specifically requested by appellant's counsel for the very reason that he wished to file an affidavit, if necessary.

The fiduciary cannot, after concealing that very information, now be heard to urge that the affidavit

was not filed in time, when the essential claim had been presented before decree of distribution entered, a fact which she has admitted.

Can this be due notice? Can this be good faith? We submit that this constituted a constructive fraud, whether intentional or unintentional.

"It is not necessary to hold that the acts in question were done with intent or design to deceive; but the test is: Did they mislead and thereby induce a party to omit the assertion of a right? In this case the record does not, in our opinion, indicate any wrongful or fraudulent design on the part of the attorney. But the finding of the court to the effect that the defendants did rely upon the conversation as a reason for not pleading within time has support in the evidence, even though no such purpose was intended by the attorney." *Bullard v. Zimmerman*, 88 Mont. 271, at page 279, 292 P. 730, 733, *Kirby v. Hoeh*, 94 Mont. 218, 21 P. 2d 732, 735.

"A court of equity, under its general powers, has the power to inquire into the account of an executor or administrator, where some ground for the exercise of equitable jurisdiction, such as fraud . . . is clearly established." 21 Am. Jur. 685, 542.

"But a settlement cannot be impeached in a separate suit by parties having notice of the proceeding because of fraud on an item which was a matter of consideration by the probate court." 21 Am. Jur. 685, Note 18.

We submit, the claim having been presented before the decree was entered, by a non-resident having no

notice, by reason of being out of the state, having no actual knowledge of the date of first publication, which she requested specifically, but the executrix having denied this material information thus committing extrinsic fraud, this cause is an independent equity suit based on diversity of citizenship and this claimant is entitled to a trial thereof on the merits. If so, the proposed amendment of the complaint should be allowed.

Respectfully submitted,

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Service accepted, and copy of the foregoing brief received, January 24th, 1958.

Karl Paine L.

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No. 15809

United States
Court of Appeals
for the Ninth Circuit

JOE PALERMO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 324)

Appeal from the United States District Court for the
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United States District Court for the Eastern
District of Washington, Southern Division

No. C-4569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE PALERMO,

Defendant.

INDICTMENT

Vio: Sec. 145(b) Internal Revenue Code. 26 USCA
145(b).

The Grand Jury charges:

Count I.

That on or about the 15th day of February, 1951, at White Salmon, in the Southern Division of the Eastern District of Washington, Joe Palermo, who during the calendar year 1950 was a married man, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950 by preparing or causing to be prepared, signing, and mailing or causing to be mailed, in the Eastern District of Washington to the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, a false and fraudulent joint income tax return on behalf of himself and his wife, and which return the defendant caused to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Wash-

ington, wherein it was stated that their net income for said calendar year was the sum of \$4,553.00 and that the amount of tax due and owing thereon was the sum of \$403.00, whereas, as he then and there well knew, their joint net income for said calendar year was the sum of \$20,426.70, upon which said net income there was owing to the United States of America an income tax of \$4,347.90, all in violation of Sec. 145(b), Internal Revenue Code; 26 USCA Sec. 145(b) [1*]

Count II.

That on or about the 9th day of February, 1952, at White Salmon, in the Southern Division of the Eastern District of Washington, Joe Palermo, who during the calendar year 1951 was a married man, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1951 by preparing or causing to be prepared, signing, and mailing or causing to be mailed, in the Eastern District of Washington to the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, a false and fraudulent joint income tax return on behalf of himself and his wife, and which return the defendant caused to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, wherein it was stated that their net income for said calendar year was the sum

*Page numbering appearing at foot of page of original Certified Transcript of Record.

of \$12,378.81 and that the amount of tax due and owing thereon was the sum of \$2,408.28, whereas, as he then and there well knew, their joint net income for said calendar year was the sum of \$34,330.29, upon which said net income there was owing to the United States of America an income tax of \$10,-862.46, all in violation of Sec. 145(b), Internal Revenue Code; 26 USCA Sec. 145(b).

Count III.

That on or about the 30th day of January, 1953, at White Salmon, in the Southern Division of the Eastern District of Washington, Joe Palermo, who during the calendar year 1952 was a married man, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1952 by preparing or causing to be prepared, signing, and mailing or causing to be mailed, in the Eastern District of Washington to the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, a false and fraudulent joint income tax return on behalf of himself and [2] his wife, and which return the defendant caused to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, wherein it was stated that their net income for said calendar year was the sum of \$11,791.22 and that the amount of tax due and owing thereon was the sum of \$2,450.90, whereas, as he then and there well knew, their joint net income for said

calendar year was the sum of \$41,249.72 upon which said net income there was owing to the United States of America an income tax of \$15,898.58, all in violation of Sec. 145(b), Internal Revenue Code; 26 USCA Sec. 145(b).

Count IV.

That on or about the 25th day of February, 1954, at White Salmon, in the Southern Division of the Eastern District of Washington, Joe Palermo, who during the calendar year 1953 was a married man, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1953 by preparing or causing to be prepared, signing, and mailing or causing to be mailed, in the Eastern District of Washington to the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, a false and fraudulent joint income tax return on behalf of himself and his wife, and which return the defendant caused to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, wherein it was stated that their net income for said calendar year was the sum of \$16,725.32 and that the amount of tax due and owing thereon was the sum of \$4,026.60, whereas, as he then and there well knew, their joint net income for said calendar year was the sum of \$29,689.49, upon which said net income there was owing to the United States of America an income tax of \$9,458.96,

all in violation of Sec. 145(b), Internal Revenue Code; 26 USCA Sec. 145(b).

A True Bill.

/s/ CALBURN MARKS,
Foreman.

/s/ WILLIAM B. BANTZ,
United States Attorney.

Date: December 5, 1956.

[Endorsed]: Filed December 7, 1956. [3]

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

Comes now the defendant and requests the Court to give the following instructions to the Jury at the time of the trial of the above cause.

VELIKANJE, VELIKANJE &
MOORE,

/s/ JOHN S. MOORE,
Attorneys for the Defendant.

Defendant's Instruction No. 1

You are instructed to return a verdict of "Not Guilty" as to all four counts of the indictment against the defendant herein. [661]

Defendant's Instruction No. 9

If the evidence in this case can be reconciled either with the theory of innocence or guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted by the jury. You will review all of the facts and circumstances in the light of this instruction. [662]

Defendant's Instruction No. 11

Unless there is substantial evidence of facts which excludes every other reasonable hypothesis but that of guilt, and if all the substantial evidence is as consistent with innocence as with guilt, then it is your duty to return a verdict of not guilty. [663]

Defendant's Instruction No. 12

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be established. It must be such as to exclude every reasonable doubt of the guilt of the defendant, and if it does not do so, or if you believe the circumstances to be as consistent with innocence as with guilt, it is your duty to acquit the defendant.

In order to convict on circumstantial evidence, the circumstances relied on must point so unerringly to the guilt of the defendant as to exclude every other reasonable hypothesis. The circumstances thus relied on must be proved by the United States to your satisfaction beyond a reasonable doubt, must be consistent with each other, and inconsistent with every other reasonable theory of innocence. [664]

Defendant's Instruction No. 16

The filing of an incorrect or inaccurate income tax return is unlawful as to the defendant, only if the defendant did so wilfully, with knowledge of its falseness, and with intent to evade taxes. There is no presumption of guilt which may be drawn from the act itself—both knowledge and wilfulness must be established by the independent proof, direct or circumstantial. [665]

Defendant's Instruction No. 20

In order to secure conviction, it is necessary that the United States prove that the conduct of the defendant was wilful. The mere fact that an incorrect tax return was filed by him is not sufficient to in itself convict the defendant. If you believe the defendant did not act wilfully, but did act mistakenly, carelessly, negligently, or even recklessly, and that he did act in good faith without any wilful intent on his part to evade or defeat any income tax payment, or as the result of inadvertence, misunderstanding, or even careless bookkeeping, it is your duty to acquit the defendant. [666]

Defendant's Instruction No. 21

You are instructed that in cases of this character, there is only one state of mind that can supply the intent necessary to sustain a conviction, and that is the specific intent to defeat or evade payment of the tax due; nor would the filing of a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the income

tax that is due. The filing of any incorrect return, without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right to do so, do not in themselves constitute wilful intent. [667]

Defendant's Instruction No. 24

“Wilfully” means knowingly and with a bad heart and bad intent. It means having the purpose to cheat or defraud, or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, or reckless, or negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books and records. He is not wilfully evading a tax if all that is shown is that he made errors. He is not wilfully evading a tax if he acts without the advice of an accountant or lawyer, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant in the keeping of his books or the preparation of his tax return. [668]

Defendant's Instruction No. 29

The basic issue in this case between the Government and the defendant is the question of whether the admitted underreporting of income by the defendant was the result of a wilful attempt by the defendant to evade income tax for the years under consideration. The Government has the burden of proving to you beyond a reasonable doubt that the defendant did wilfully attempt tax evasion, which

the defendant denies. "Wilful attempt" consists of two elements, the attempt itself, and knowing criminal intent. In determining the question of "wilful" before you may find against the defendant on any count of the indictment you must find beyond a reasonable doubt that at the time of the preparation and filing of defendant's income tax return for the tax year of such count, defendant had the specific intent to file an income tax return understating his income with the evil motive or bad purpose of thereby evading or defeating the payment of his proper income tax, that is, a criminal intent.

The intent, if any, with which an individual performs an act cannot be proved by others, normally, except by circumstantial evidence. Certain acts or conduct may be used by you in making a determination of whether or not the defendant had such specific criminal intent, while other acts or conduct may not. Acts or conduct from which an affirmative wilful attempt to evade may be inferred are such as deliberate concealing of assets, keeping two sets of books, making of false entries, invoices, or alterations in books, covering up sources of income, deliberate destruction of records, and other conduct the likely effect of which would be to mislead or conceal. However, the fact of understatement of income, the amount of the deficiency of tax or income, or disparity between income received and income reported cannot be considered as a factor proving or tending to prove the specific criminal intent. No presumption of criminal intent arises merely because of the underreporting of income itself. In addition, acts, or

conduct which are the result of carelessness, negligence, ignorance, or inadvertence [669] may not be used to infer the specific criminal intent because such acts or conduct would negative the existence of the necessary condition of intent itself.

Further, in your consideration of such facts, if any be present in this case, it is essential, before you may infer specific criminal intent from any acts or conduct of the defendant, that such acts or conduct be consistent with the theory of the defendant's guilt, inconsistent with every reasonable theory of the defendant's innocence, and exclude every reasonable doubt of the defendant's guilt.

Therefore, your process of consideration of the element of specific criminal intent on each count should be as follows: First, determine whether or not you can find beyond a reasonable doubt the existence of acts or conduct on the part of the defendant, from which, as circumstantial evidence, you feel you might infer the existence of a specific criminal intent in the defendant to evade or defeat his income tax. If you find no such acts or conduct at this point, you must acquit the defendant without further consideration. Second, if you do so find, then determine whether those acts and conduct are consistent with the theory of defendant's guilt, inconsistent with every reasonable theory of the defendant's innocence, and exclude every reasonable doubt of the defendant's guilt. If you conclude that these three conditions exist as to such facts, then you should find one of the essential factors necessary to determine the defendant's guilt—the existence of the

specific criminal intent. However, if having found such acts or conduct to exist, you do not find that they are consistent with the theory of the defendant's guilt, or if you do not find that they are inconsistent with every reasonable theory of defendant's innocence, or if you do not find that they exclude every reasonable doubt of the defendant's guilt, then or in either of those events, you must acquit the defendant.

[Endorsed]: Filed July 26, 1957. [670]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, find the defendant, Joe Palermo,

Is Guilty as charged in Count 1 of the Indictment;

Is Guilty as charged in Count 2 of the Indictment;

Is Guilty as charged in Count 3 of the Indictment and

Is Guilty as charged in Count 4 of the Indictment.

/s/ G. E. BOYLE,
Foreman.

[Endorsed]: Filed July 30, 1957. [671]

United States District Court for the Eastern
District of Washington, Southern Division

No. C-4569

UNITED STATES OF AMERICA,

vs.

JOE PALERMO.

JUDGMENT AND COMMITMENT

On this 30th day of July, 1957, came the attorney for the government and the defendant appeared in person and with counsel, John S. Moore, Jr. and F. Frederick Velikanje.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of Vio. Sec. 145(b), Title 26, USC Evasion of Income Tax as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Six months and fine of \$2,500.00 on Count 1;

Six months and fine of \$2,500.00 on Count 2;

Six months and fine of \$2,500.00 on Count 3,

and

Six months and fine of \$2,500.00 on Count 4, imprisonment sentences to run concurrently. Execution of sentence suspended for ten days.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed July 30, 1957. [672]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL
OR IN THE ALTERNATIVE FOR A NEW
TRIAL

The defendant moves the Court for judgment of acquittal or in the alternative to grant him a new trial for the following reasons:

1. That the Court erred in denying the defendant's motion for acquittal made at the conclusion of the evidence.
2. That the verdict is contrary to the weight of the evidence.
3. That the verdict is not supported by substantial evidence.
4. That the Court erred in charging the jury and in refusing to charge the jury as requested.

5. That the Court erred in admitting exhibits offered by the plaintiff to which objections were made.

/s/ JOHN S. MOORE, JR.,

/s/ E. FREDERICK VELIKANJE,
Attorneys for the Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1957. [673]

United States District Court Eastern District of
Washington, Southern Division

No. C-4569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE PALERMO,

Defendant.

RECORD OF PROCEEDINGS ON MOTION
FOR JUDGMENT OF ACQUITTAL OR, IN
THE ALTERNATIVE, MOTION FOR NEW
TRIAL

Be It Remembered that the above-entitled cause came on for hearing at Pasco, Washington, on the 5th day of September, 1957, before the Honorable Sam M. Driver, Judge of the said Court; William B. Bantz, United States Attorney, Eastern District of Washington, appearing on behalf of the plaintiff; John S. Moore appearing on behalf of the defend-

ant; and the following proceedings were had, to wit: [674]

The Court: United States against Joe Palermo, motion for judgment of acquittal and, in the alternative, motion for new trial.

Mr. Moore.

Mr. Moore: Your Honor, I don't have very much that is new that we didn't argue before so I won't dwell on it in view of the memorandum which I have submitted.

The Court: I have read your memorandum.

Mr. Moore: I merely wanted to point out two things:

Going back to the Elwert case, which I cited to the Court at the close of the trial and the Court at that time advised that in the Court's opinion the Supreme Court had thrown that rule out——

The Court: Do you have the citation there?

Mr. Moore: Of the Elwert case?

The Court: That is on the circumstantial evidence, you mean?

Mr. Moore: No, the Elwert case is the one which said that unless the Court ruled that reasonable minds could not find——

The Court: Oh.

Mr. Moore: ——some other hypothesis other than guilt, that the Court had to direct a verdict of acquittal, and along that line the Court advised that the Court's opinions in the Holland case and Consumer cases had ruled [675] otherwise and set aside that rule.

I merely wanted to point out that it appears to us

that the Holland case merely sets up the rule that where the Court was discussing the circumstantial evidence instruction in that case, the Court said:

“The petitioners assail the refusal of the trial judge to instruct that where the government’s evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions.”

The Court: I gave you a citation of the Supreme Court case in which the Supreme Court of the United States has said, just as clearly as the English language can say it, that it isn’t necessary to instruct that in a criminal case the evidence must be such as to negative every reasonable hypothesis except that of guilt; that it isn’t even the best practice to give it. They say that what you should do is to say there is no difference between circumstantial and direct evidence; that the jury should consider them both alike; and that the only requirement is that from all the evidence the jury be convinced of guilt beyond a reasonable doubt. I gave you that citation up there, I [676] haven’t got it here.

Mr. Moore: Well, your Honor——

The Court: You know the case that I am talking about?

Mr. Bantz: Yes.

The Court: Recent case of the Supreme Court of the United States in which it seems to me they say it isn’t necessary to give that instruction.

Mr. Bantz: I looked it up at the time and that is

my understanding, but I don't have it here, what you are talking about.

Mr. Moore: Your Honor, that is exactly what I am saying; I say the same thing, that if you give a proper instruction on reasonable doubt, you do not have to give a circumstantial evidence rule.

The Court: Well, I gave the instruction that there are two kinds of evidence, direct and circumstantial, told them what direct was and what circumstantial was. I said there is no distinction between the two, that they must be convinced from all the evidence beyond a reasonable doubt of the guilt of the accused. I gave that instruction in this case.

Mr. Moore: Yes, I realize that. I say that the Court is correct and that is what the Supreme Court has said, but I merely wanted to point out to the Court that the [677] Elwert case is not talking about that particular point. The Elwert case was putting it at the stand of where the judge is viewing the evidence at the close of the case and what the judge should do or should not do. In other words, our stand is that at the close of the entire case, there being circumstantial evidence only as to intent, that evidence did not exclude every reasonable hypothesis other than that of guilt.

The Court: I do not understand it that way. I don't think the Supreme Court intended to lay down one rule for the jury and another rule for the judge in passing upon these matters. That is my firm conviction after carefully reading that case and rereading it, and if I am wrong, it is easy to get a reversal.

Mr. Moore: That was the only thing I wanted to bring to the Court's attention at this time. I won't argue the rest of those matters that I have presented to the Court in the memorandum, although I will not withdraw them.

The Court: I might say that the Ninth Circuit Conference, which, of course, has no official authority so far as the Court is concerned, but it is an assemblage of the Judges of the Circuit and the District Judges of the Ninth Circuit, and this very thing was discussed and in the forms of criminal instructions that Judge Mathis of Southern California has prepared and with the approval of the Ninth [678] Circuit and have been published in the Federal Rules, this very thing is considered and the Conference came to the conclusion that you didn't have to give that instruction that the evidence must negative every reasonable hypothesis except that of guilt; that the proper one to give was the one I gave here, so it isn't just my own idea.

I think, then, that the motion should be denied—both motions, I should say.

Mr. Moore: Yes.

The Court: Court will recess until 2 o'clock, then. [679]

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Donald B. Oden, do hereby certify: That at all times herein mentioned I was acting as the Official

Court Reporter of the United States District Court for the Eastern District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the said Court, held at Pasco, Washington, on the 5th day of September, 1957; that the within and foregoing is a full, accurate and complete transcript of the proceedings on motion for judgment of acquittal or, in the alternative, motion for new trial, in the above-entitled cause.

Dated this 29th day of October, 1957.

/s/ DONALD B. ODEN,
Official Court Reporter.

[Endorsed]: Filed October 30, 1957. [680]

[Title of District Court and Cause.]

ORDER

On the 5th day of September, 1957, at Pasco, Washington, the defendant's motion for judgment of acquittal or in the alternative for a new trial was presented to the above-entitled court and the defendant filed a memorandum of points and authorities in support of motion for acquittal or in the alternative for a new trial and gave oral argument in support of said motion and the court having read the memorandum of points and authorities and heard the oral argument of counsel, ordered as follows:

Motion for judgment of acquittal or in the alternative for a new trial is hereby denied.

Dated September 9th, 1957.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ WILLIAM B. BANTZ,

United States Attorney.

[Endorsed]: Filed September 9, 1957. [681]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant's Name and Address: Joe Palermo, White Salmon, Washington.

Appellant's Attorneys' Names and Addresses: John S. Moore, Jr., and E. Frederick Velikanje, 415 Miller Building, Yakima, Washington.

Offense: Violation of 145(b) of Title 26, United States Code, Evasion of Income Tax.

STATEMENT OF JUDGMENT AND SENTENCE

By Judgment entered July 30, 1957, before the Hon. Sam M. Driver, United States District Judge of the above-entitled Court, appellant was adjudged guilty upon a verdict of guilty rendered by a jury, and appellant was sentenced to six months imprison-

ment and fine of \$2,500.00 on Count One, six months imprisonment and a fine of \$2,500.00 on Count Two, six months imprisonment and a fine of \$2,500.00 on Count Three, and six months imprisonment and a fine of \$2,500.00 on Count Four, with the imprisonment sentences to run concurrently and the execution of sentence suspended for ten days. Thereafter, on September 5, 1957, before the above-entitled Court with the Hon. Sam M. Driver, United States District Judge presiding, appellant's motion for Judgment of Acquittal or in the Alternative for a New Trial was denied by order entered on Sept. 9, 1957.

That appellant is now free on bail of \$2,500.00. The above-named [682] appellant does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated Judgment and the Order Denying Appellant's Motion for Judgment of Acquittal or in the Alternative for a New Trial.

Dated this September 5, 1957.

/s/ JOHN S. MOORE,

/s/ E. FREDERICK VELIKANJE,

Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 9, 1957. [683]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

On Motion of Defendant and for good cause shown, it is hereby

Ordered that in accordance with Rule 39C of the Federal Rules of Criminal Procedure, the time to docket and file the record on appeal in the above-entitled cause with the United States Court of Appeals for the Ninth Circuit shall be and the same is hereby extended to the 1st day of December, 1957.

Done this 10th day of October, 1957.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by :

/s/ JOHN S. MOORE,

Of Attorneys for Defendant.

Approved by :

/s/ WILLIAM B. BANTZ,

United States Attorney.

[Endorsed] : Filed October 10, 1957. [686]

In the District Court of the United States for the
Eastern District of Washington, Southern Division

Number C-4569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE PALERMO,

Defendant.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled and numbered cause commencing at 11:00 o'clock, a.m., on the 26th day of February, 1957, before the Honorable William J. Lindberg, a United States District Judge, at Yakima, Washington.

Appearances:

MR. FRASER,

Assistant United States Attorney,

Appeared for and on Behalf of the
Plaintiff; and

JOHN S. MOORE, JR., of

VELIKANJE, VELIKANJE AND MOORE,

Appeared for and on Behalf of the Defendant. [4*]

Mr. Fraser: This is United States vs. Joe Palermo. Mr. Palermo is charged by a four-count Indictment returned December 5, 1956, for wilful eva-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

sion of Federal taxes under section 145(b), Internal Revenue Code. He is represented by John S. Moore, Jr., and indicates he desires to waive reading of the Indictment. Mr. Moore has been furnished a copy of the Indictment.

The Court: Your name is Joe Palermo?

The Defendant: Yes.

The Court: Is that your true and correct name?

The Defendant: Yes.

The Court: And Mr. Moore is your counsel. Do you know the nature of the charges contained in the Indictment?

The Defendant: Yes.

The Court: Mr. Moore, you waive the reading of them?

Mr. Moore: Yes.

The Court: Are you ready to enter a plea at this time?

The Defendant: Yes. [5]

The Court: The Court will ask you what your plea is to Count I?

The Defendant: Not Guilty.

The Court: Plea of not guilty may be entered to Count I. Do you enter a similar plea to all four counts?

The Defendant: Not Guilty.

The Court: All right. Bail has been posted in this amount—in the amount of one thousand dollars (\$1,000.00). Do you wish that to remain?

Mr. Fraser: Yes, sir; that is perfectly all right with the Government.

The Court: This matter then will be set for trial and the Defendant will be advised. Judge Driver will be here about the middle of May.

(Whereupon, hearing in the within-entitled and numbered cause was adjourned.) [6]

Reporter's Certificate

I, Earl V. Halvorson, Official Court Reporter for the United States District Court, Eastern and Western Districts of Washington, do hereby certify that the foregoing transcript has been prepared by me or under my direction and I do further certify that said transcript is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth.

/s/ EARL V. HALVORSON. [7]

United States District Court for the Eastern
District of Washington, Southern Division

No. C-4569

UNITED STATES OF AMERICA,

Plaintiff.

vs.

JOE PALERMO,

Defendant.

Be It Remembered, that the above-entitled cause came regularly on for trial and determination at Yakima, Washington, on Tuesday, July 23, 1957, before the Honorable Sam M. Driver, United States

District Judge, the Chief Judge of the above-entitled Court, sitting with a jury.

The plaintiff was represented by Mr. William B Bantz, United States Attorney for the Eastern District of Washington, and Mr. Robert Frazer, Assistant United States Attorney for the Eastern District of Washington.

The defendant was represented by Mr. John S. Moore, Jr.; And by Mr. E. Frederick Velikanje, of Messrs. Velikanje, Velikanje & Moore, Attorneys at Law, Yakima, Washington.

Whereupon, proceedings were had and testimony taken as follows, to wit:

The Court: The Clerk will call the roll of the jury. Are you ready, Gentlemen, in the case of United States of America vs. Joe Palermo? [26]

Mr. Bantz: The United States is ready, your Honor.

Mr. Moore: The defendant is ready, your Honor.

The Court: All right, proceed to impanel the jury.

(Whereupon, the jury panel was sworn and twelve jurors placed in the box for questioning.)

STATEMENT TO THE JURY

The Court: Now, Ladies and Gentlemen, I will tell you just enough about this case to enable you to answer these questions. The real issues in the case will be explained to you in much more detail from the attorneys and of course you will get it from the evidence as the case goes on. This indictment, which

is the formal charge in this case as I have told you in other cases, is not any evidence against the defendant. It is merely a statement of the charges against him on which he is tried, and as he has controverted the indictment by a plea of not guilty, it isn't to be taken as evidence of his guilt.

There are four counts. The indictment reads as follows, and I am only going to read to you the first count: It says That on or about the 15th day of February, 1951, at White Salmon, in the Southern Division of the Eastern District of Washington, Joe Palermo, who during the calendar year 1950 was a married man, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950 by preparing or causing to be prepared, signed and [27] mailing or causing to be mailed, in the Eastern District of Washington to the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, a false and fraudulent joint income tax return by which he substantially understated the amount of his income and the amount of the tax.

Now, Count II is identical to Count I, except that it is laid a year later, the 9th day of February approximately of 1952, and involves the income tax for the calendar year 1951. Count III is the same again, except that it involves income tax for the calendar year 1952, and Count IV is the same except it involves income tax for the calendar year 1953.

There are four counts that serve for four years in

succession. Now, Mr. Palermo resides at White Salmon, does he, Mr. Moore?

Mr. Moore: Yes, your Honor.

The Court: And his attorney is Mr. Moore whom I just asked this question. Would you mind just standing, Mr. Palermo, so we can see who you are. Thank you. And Mr. Bantz is the United States Attorney, and perhaps you better stand up Mr. Bantz and Mr. Moore so everybody will know you.

(Whereupon, the jury was duly impaneled and sworn to try the case, and after being duly admonished not to discuss the case, court was adjourned until 1:30 p.m.) [28]

July 23, 1957, 1:30 P.M.

OPENING STATEMENT OF GOVERNMENT

Mr. Bantz: Your Honor, Ladies and Gentlemen of the Jury, and Counsel for the defendant: This is what we call the opportunity that I have as the Attorney for the United States to make an opening statement and tell you what we, the United States, as plaintiff will prove in the case and what we must prove so that the case has been sufficiently covered to give it to the jury for you to make a decision.

Judge Driver this morning briefly went over what the case was about. I am not going to read the whole Indictment. I will go over part of it for you as you will have the Indictment in the jury room with you, if that is the case, when you deliberate and can read it carefully. However, I am going to explain in simple laymen's language what it says so that you

will understand a little bit more as the trial proceeds.

To begin with, you are going to have to bear with us for a little while. This is not one of these speedy trials where a fellow gets on that can talk. We have a lot of exhibits. We intend to produce numerous particulars. I will go over those in a minute and some other statements, and I am sure that the defense will also. Mr. Moore and I will try to expedite it as much as possible to keep you attentive enough to what is going on. Some of the testimony takes more time [29] than other testimony does and is necessary, and we have legal procedure to follow and of course the Court keeps us within those bounds and we must adhere to it.

Now, I want to read from the Indictment in which Count I is involved. I will cover it carefully. The other counts are the same except other years and figures are involved. Count I reads as follows:

“That on or about the 15th day of February, 1951, at White Salmon, in the Southern Division of the Eastern District of Washington, Joe Palermo, who during the calendar year 1950 was a married man, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950 by preparing or causing to be prepared, signing, and mailing or causing to be mailed, in the Eastern District of Washington to the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, a false and fraudulent joint income tax

return on behalf of himself and his wife, and which return the defendant caused to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Washington at Tacoma, Washington, wherein it was stated that their net income for said calendar year was the sum of \$4,553.00 and that the amount of tax due and owing thereon was the sum of \$403.00, whereas, as he then and there well knew, [30] their joint net income for said calendar year was the sum of \$20,426.70, upon which said net income there was owing to the United States of America an income tax of \$4,347.90, all in violation of Section 145(b), Internal Revenue Code; 26 USCA Sec. 145(b).

I will want to take a moment and tell you what that means. The legal language in there ends up this way and means that we must prove that he must pay an income tax, that he has made enough money that he must file an income tax return. We are alleging in here that he filed it and that he voluntarily filed it and made it up when he knowingly and wilfully had knowledge of more income than he had reported and paid tax on.

Now, there are four counts, the first 1950, second 1951, third 1952 and fourth 1953; four separate counts, and I am sure at the end of the trial that the Court will instruct you that each count is a separate crime and so I ask that you pay attention to the years. There are four years involved here.

Now, the Government will talk here concerning other years but they are not what you are concerned

here with as to the crime. We will show that is how he operated his business. But I want to call your attention to remember that there are four separate counts with reference to the defendant starting with the year 1950. The rest of the counts read exactly the [31] same with the exception that they go into the different amount of money. I will come to that. I am going to cover it carefully in a moment.

Now, generally, the Government has two ways in which they can prove the false and fraudulent filing of income tax returns. One is what we call "net worth basis" and the other is by "specific items." And the net worth basis, briefly, is where we start a man with "X" dollars and in a few years later he has in his possession and control "XY" dollars, the increase of which he can't show how he made that and didn't pay income tax on it. The other, specific items, is a matter in which we will show that he received money for certain things which he did not put into his return and did not account for, and we will show it by checks and vouchers or by other means or bank accounts.

Now, in this particular case basically all of our Indictment is drawn on specific items. We are going to introduce through the witnesses several hundred checks and some bank statements, and we are going to rely mainly on specific items. However, there will be a summation of the evidence on a net worth basis showing how much the defendant was worth in the year of 1948, let us say, or 1949, and again at the end of 1953.

Now, the Government has—we start out on one of these cases and we have investigators who are called Internal [32] Revenue Agents in their different divisions, one in the Auditing Section and the other in the Intelligence Section. We have Mr. Paul Simonson from the Intelligence Section here and he will testify, and Mr. Donald Blankenship another one of the Agents with the Internal Revenue Department; and both do C.P.A. work for our office when it is turned into us and they do the preliminary work and all of our investigation.

Now, the case that we are about to present is that we are alleging that this case involves an understatement of income. Mr. Palermo, the defendant here, filed his four income tax returns. On there he did like any of us do. He took his expenses deducted. We are not denying any expense at all in these four years, as far as that is concerned. We are alleging and our proof should show, and if it doesn't you are to so find, that he understated his gross receipts from his logging operations. That is the basis of our case. We are not challenging any of the expenses that he made that might be a little bit different, but they do come up under net worth analysis later on but it isn't of particular purport at this time.

I want to go a little bit further. Anything I say at this time I do not mean for you to take as the law or the evidence. I am up here to explain the position of the United States as the plaintiff, and I don't want you to believe everything I say that isn't it. I only want to show what we intend to prove the next few days in the courtroom [33] here and the only

thing you should use in your determination of the case would be from the evidence itself adduced by the witnesses under questioning here in the courtroom.

We are going to show somewhat in 1949 which is not one of the indictment years, but I believe we will be entitled to show that the defendant did not record certain checks in his books and they were amounting to some \$10,000.00, and that he did not report in his report of 1949, which is not charged here but which we will show as a pattern along in the time. Before we get to 1950 I want to say that the evidence will show that he took in certain items and the evidence will show that he took in money and wrote it down on a piece of paper and we will have as a witness this man that made out the income tax and made out those income tax returns, which were signed by Mr. Palermo and his wife and were mailed to the Collector of Internal Revenue at Tacoma, Washington, where they were processed.

Now, in 1950 the Indictment charges that he states that he made \$4,553.00 which he should pay income tax on and he paid in that year \$403.00. That will show on his income tax return. However, our evidence will show that during that year he received a total of about fifty-three checks and he did not record sixteen of them in his books. And we will attempt to show, as alleged in the Indictment that he left off \$15,800 and some odd dollars of gross income of which there should [34] have been an additional amount of \$3,900 plus dollars in tax paid.

Now, in 1951 we alleged in the Indictment that he made as his income tax return shows and that he filed that he made \$12,300 and some dollars and that he paid \$2,400 and some dollars in tax. We will show that as alleged in the Indictment that he left off some \$21,900 of his income and should have paid, if the above figure is correct, an additional \$8,454.00. I believe that we can show that he received that year from logging operations some fifty-four checks of which he did not record in his books and records some twenty-five of those checks, amounting to about forty-five per cent of the number of checks that he received.

In the year 1942 it is alleged in the Indictment that he made in accordance with his income tax return \$11,790.00 and that he paid income tax that year \$2,450.00. I am leaving off these odd cents here because it just takes too much time. Whereas, in the Indictment we also charge that he well knew and wilfully left off of his income tax return an additional \$29,458.00, and should have paid, if that figure is correct, an additional \$13,400 of income tax. In 1952 I believe our evidence will show that he received sixty-seven checks, and thirty-nine of those were unrecorded, which is about fifty-five per cent of the number of checks received.

In 1953 his income tax return shows that he [35] paid income tax on \$16,725.00 and that the tax for that year that he paid was \$4,026.00, and we alleged in the Indictment and we will attempt to prove here that he left off some \$12,960 and should have paid an additional \$5,432 in tax. I believe that the evidence

will show that in the year 1953 he received sixty-one checks of which he did not record in his books some nineteen of those checks.

I believe that the evidence will show that the slips of paper and the other items that he gave to his man Mr. Bates to make up the income tax return did jibe exactly with his books and that the books he kept did not record these checks or jibe with the income tax return. Of course, we are alleging that he left off of his income the matters that I have been discussing here of unrecorded checks. We will attempt to show what has happened to those during this trial.

During those four years our evidence is and we will attempt to show that there were 235 checks paid to Mr. Palermo, of which ninety-nine were not reported by him, and we will of course break them down by the years as I have been discussing with you previously.

Now, the matter of this case is many times baffling to the individuals when they hear of a fraudulent income tax case. It is a matter for the jury to sit and listen to the facts before them and determine if a defendant knowingly and wilfully failed to file a proper income tax return. It is no [36] mystery. It is no matter that has to be handled in any other way than with common sense. I think in this particular case that there will be a little bit less arguing than in many of these cases that we have because the facts are pretty well agreed upon as to figures by both sides. And it is incumbent upon you to listen to the evidence and the instructions of the Court, which is final, the Court instructs you on the law and you

must listen to that and then make up your minds from the evidence that we produce from this courtroom. I know that the Court asked you this morning to make up your mind after you have heard both sides. I would ask you to do that too. I am not asking you to convict any man until you have heard the evidence from the Government and the evidence from the defense that Mr. Moore and his associate will produce at the time of the trial. It is a little bit hard for you to do it but I am anxious as the Government is and I am sure that Mr. Moore is that you do so. It is a tough problem and we will do as well as we can to keep things straight for you.

Now, I want to tell you momentarily here of what we are going to do in the way of calling witnesses. We have about twenty witnesses, maybe one or two either way, of which some are relatively short, and others will take a little bit longer time. I don't know what the defense has but I thought that I should tell you that we the plaintiff in this case [37] expect to use these witnesses and produce the checks and bank statements and other supporting vouchers so that we may present all the evidence to you concerning this case.

I have nothing further at this time, and thank you, your Honor.

The Court: Do you wish to reserve your statement, Mr. Moore?

Mr. Moore: No, I think I will make it now, your Honor.

The Court: That is all right.

OPENING STATEMENT OF DEFENDANT

Mr. Moore: Your Honor, Counsel, and Ladies and Gentlemen: I think I will make a short statement at this time of what I think this case will prove for you. As Mr. Bantz has said, the Government has come before you today and they have the burden of proving beyond a reasonable doubt that Mr. Palermo has violated the Federal laws.

Now, he has indicated to you something in the nature of how much Mr. Palermo is delinquent in his income tax. We have no objection to that. We agree that he is delinquent in his income tax. As a matter of fact, we actually believe that Mr. Palermo owes more than Mr. Bantz has indicated. We have been working on this for quite a while and actually the exact amount that he owes is not too important as far as this case is concerned because the important thing as far as Mr. Bantz's case presenting it to you and our defense is whether or not, whatever that delinquency amounts to, is the result of [38] Mr. Palermo's criminal intent to evade taxes.

The only way that Mr. Bantz can present to you whether he did or did not intend to evade taxes is to not effect what Mr. Bantz believes is the type of man that Mr. Palermo is, and of course at that point we go in an opposite direction from Mr. Bantz.

Our evidence will I think prove to you exactly what kind of man Mr. Palermo is and when you have heard all of the evidence I think you will agree with us that he did not attempt to evade taxes. He is not the kind of man that would try it and he wasn't try-

ing it in any of these years. Mr. Palermo has been in business since 1947. From 1932 to 1947 he was a truck driver, driving a logging truck, working on and off for his father-in-law. In 1947 with his father-in-law's assistance he bought two or three pieces of equipment and went into the logging business.

He is not a contract logger and he doesn't go out and enter into a contract to haul logs for somebody else. He goes out and looks over the land and buys the timber on it if he can and logs it off himself and sells the logs. And ever since he went into this business it hasn't been a large business and he has had five or six or seven employees, and the business was a success because Mr. Palermo was out doing the work himself. He might work six days a week from morning until dark. And very probably he was at fault—not criminal [39] fault—but he was at fault for not maintaining better books and for not paying closer attention to what his income and outgo was. He didn't do that but that is not a crime.

So, as far as this case is concerned and from the defendant's standpoint, we will merely demonstrate to you facts from which I am sure you will find that he had no criminal intent at any time. Thank you.

Mr. Bantz: May I proceed?

The Court: You may proceed.

Mr. Bantz: Leona Jones.

Mr. Moore: Your Honor, before we proceed, I want to advise the Court that Mr. Palermo is a little bit hard of hearing and I have mentioned that so I might interrupt occasionally.

The Court: Yes.

LEONA M. JONES

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. Mrs. Leona M. Jones.

Q. And where do you live, Mrs. Jones?

A. I live at Gig Harbor, Washington.

Q. And where are you employed? [40]

A. In the Internal Revenue Office at Tacoma, Washington.

Q. And how long have you been employed there?

A. More than fifteen years.

Q. And what is your position with the Internal Revenue?

A. I am the Acting Chief of the Returns Processing Branch in the Collection Division.

Q. Now, what does that job entail?

A. Well, considerable. It includes the processing, the original processing of all returns and their filing.

Q. Do you mean that a return that is filed in the District of Washington is filed in your office?

A. Yes, sir. And in Alaska.

Q. And also in Alaska? A. Yes, sir.

Q. Now, does the Tacoma district include the Eastern District of Washington?

A. Yes, sir.

Q. Would you just explain to the Court and to the jury what are the steps that are taken by the In-

(Testimony of Leona M. Jones.)

ternal Revenue in the handling of an income tax return that comes to your office after it has been mailed or delivered by a citizen?

A. The first thing that happens, the envelope is opened, and the return or the contents of the envelope stamped with the receiving date on it, and from that stage the return is checked for signature, name and address and a complete [41] address and it is numbered with a serial number under which it is filed and the Form W-2 is one is attached is verified with the income shown on the return, and the return is mathematically verified as far as the computation of tax. In the final processing the tax that is due is assessed and if an overpayment is due a check is issued or a claim is allowed and the return is filed.

Q. Now, when you say that the return is filed, what do you mean by that?

A. It is placed in our returns file.

Q. And that is where you are employed now?

A. I am employed doing all of those things.

Q. You are in charge of that? A. Yes.

Q. Now, did you bring with you as a result of inquiry, made some income tax returns?

A. Yes, I did.

Q. Some other papers? A. Yes, I did.

Q. May I have those returns, please.

A. Yes, sir.

Mr. Bantz: Would you mark all of those separately?

The Clerk: As a group?

(Testimony of Leona M. Jones.)

Mr. Bantz: Yes, as a group.

The Clerk: That will be the plaintiff's 1 through 6, [42] your Honor.

Q. Mrs. Jones, handing you Plaintiff's No. 1 for Identification, that is one of the income tax returns that you brought with you, is that correct?

A. Yes, sir.

Q. And who is that income tax return from, or purported to be from?

A. It is the return of Joe Palermo and Bertha Palermo, White Salmon, Washington.

Q. And that income tax return came from your custody at Tacoma? A. Yes, sir.

Q. And looking at Plaintiff's Exhibit 2 for Identification, would you examine that. Is that one that you brought with you? A. Yes, sir.

Q. And is that from your files?

A. Yes, sir.

Q. And is that one also from Joe and Bertha Palermo of White Salmon, Washington?

A. It is.

Q. And handing you Plaintiff's Exhibit 3 for Identification, is that one from your files?

A. Yes, sir.

Q. And is that for Joe and Bertha Palermo? [43]

A. Yes, it is.

Q. White Salmon, Washington? A. Yes.

Q. Now, is there an identification mark on there that you can tell that it was filed in your office?

A. Yes, there is a receiving stamp on the return.

Q. On each one of the three? A. Yes.

(Testimony of Leona M. Jones.)

Q. Now, handing you Plaintiff's Exhibit No. 4 for Identification, would you please examine that and state if that is one of the returns that you brought with you? A. Yes, sir.

Q. And does that purport to be one from Joe and Bertha Palermo? A. Yes, sir, it is.

Q. And is that from your files at Tacoma?

A. Yes, sir.

Q. And handing you Plaintiff's Exhibit 5 for Identification, would you examine that. Is that one that you brought from your files in Tacoma?

A. Yes, sir.

Q. And does it purport to be the income tax return of Joe and Bertha Palermo? A. It is.

Q. And would you look at Plaintiff's Exhibit 6 for Identification. [44] Is that one that you brought from Tacoma with you and has that been in your custody with the Internal Revenue?

A. Yes, sir.

Q. And does that purport to be from Joe and Bertha Palermo of White Salmon, Washington?

A. Yes, it is.

The Court: Could you have the witness give us the years involved so that it will help to keep it straight.

Q. (By Mr. Bantz): Would you start with Exhibit 1 and give us the years?

A. Exhibit 1, '48; Exhibit 2, '49; Exhibit 3, '50; Exhibit 4, '51; Exhibit 5, '52; Exhibit 6, '53.

The Court: Now, are you giving us the year for

(Testimony of Leona M. Jones.)

which the tax was returnable or the year for which it was filed?

A. No, I am giving the year for which——

The Court: The tax was covered?

A. Yes.

The Court: All right.

Q. (By Mr. Bantz): In other words, when it says 1953 on the return that is the year that the tax was due?

A. That is the year that the tax was incurred.

The Court: For the calendar year 1953?

A. Yes. The tax would not be due until not later than March 15th for the following year. [45]

The Court: Yes, I understand.

Q. (By Mr. Bantz): Now, on Exhibit 6, too, is there an identifying mark of the Internal Revenue for the date and time of the return?

A. Yes, sir. The "91" is stamped for the District of Washington and Alaska and you will notice that each receiving stamp is with the large figure "91" and the date is included on the receiving stamp for each return.

Q. And there is one on each of these exhibits?

A. Yes, sir.

Q. Exhibits 1 through 6? A. Yes, sir.

Mr. Bantz: All right. Now, I will offer Plaintiff's 1 through 6 in evidence.

Mr. Moore: No objection to 3, 4, 5, and 6, your Honor. We object to the Plaintiff's 1 and 2.

The Court: Well, I will reserve ruling on the others until later statements in the trial. 3, 4, 5 and 6 will be admitted.

(Testimony of Leona M. Jones.)

(Whereupon, the said Income Tax returns were admitted in evidence as Plaintiff's Exhibits 3, 4, 5 and 6.)

Q. (By Mr. Bantz): Handing you Plaintiff's Exhibit 3, would you examine that and tell me now when that was filed? [46]

A. March 5th, 1951.

Q. All right, that is for the year 1950 then?

A. Yes, sir.

Q. Now, how much tax was due that year?

A. The return indicates that there is tax due of \$403.00.

Q. And does it show that it was paid?

A. Yes, it does.

Q. How do you show that it is paid?

A. With blue circle around the figure indicates that that was paid, that amount was paid.

Q. And does that mean then that it was handled in the regular course of processing in your office?

A. Yes, it does.

Q. Now, handing you Plaintiff's Exhibit 4, is that return for the year 1951? A. Yes.

Q. And what day was that filed?

A. February 18, 1952.

Q. In Tacoma? A. Yes, sir.

Q. Now, what was the tax due in that year?

A. \$2,489.28.

Q. And does the return show that that was paid?

A. Yes, it does.

Q. And how can you tell that? [47]

(Testimony of Leona M. Jones.)

A. The tax is encircled with a blue circling.

Q. And that is the way that you handle them in your office? A. Yes, sir.

Q. Handing you Plaintiff's Exhibit 5, is that the income tax return for 1952? A. Yes, sir.

Q. And when was that filed?

A. January 31st, 1953.

Q. All right, and what is the tax due that year?

A. The tax was \$2,531.90.

Q. And what was paid that year?

A. The payments were made on estimated tax totaling \$2,919.60.

Q. And that was paid?

A. Yes, that was paid.

Q. Now, handing you Plaintiff's Exhibit 6, is that for the year 1953? A. Yes.

Q. And when was that filed?

A. March 1st, 1954.

Q. And in this year how much income did he show on his return?

A. He shows adjusted gross income of \$17,725.32.

Q. All right. And then how much tax was due?

A. The total tax was \$4,107.60.

Q. And that was paid? [48]

A. Yes, it was paid by estimate and the payment.

Q. Now, each of the income tax returns will show the gross adjusted income he may have made?

A. Adjusted gross income.

Q. Adjusted gross income? A. Yes.

Q. And will show how much money he paid tax for each year? A. Yes.

(Testimony of Leona M. Jones.)

Q. Now, did you bring another paper with you?

A. Yes, I did.

Q. May I have that, please. Just arrange them so I will know what they are. Now, I asked you to bring some additional papers with you; are these the items that I asked you to bring?

A. Yes, they are.

Q. What does that purport to be?

A. It is a Certificate of Assessments and Payments received in our office.

Q. For what individuals?

A. For Joe and Bertha Palermo, White Salmon, Washington.

Q. Did you check those figures and the records yourself? A. Yes, I did.

Q. And did you see that they were prepared?

A. Yes, sir, I did.

Q. Now, were these figures obtained from the records in your [49] office? A. Yes.

Q. All right. And that is in Tacoma?

A. Yes, sir.

Mr. Bantz: Make them two separate exhibits.

The Clerk: Plaintiff's 7 and 8.

Q. Handing you Plaintiff's Exhibits for Identification 7 and 8, what do those show?

A. It shows assessment and payment of tax, 1952 or 1948 through 1954.

Q. By that you mean it shows what tax was due and what was paid? A. Yes, sir.

Q. In accordance with his records?

A. That's right.

(Testimony of Leona M. Jones.)

The Court: What periods are covered by each of them?

A. Exhibit 7 covers 1948, 1949, 1950, 1951, part of 1952; and 1952 is continued on Exhibit 8.

The Court: Oh, 8 carries it on through?

A. Yes, through 1953 and 1954.

The Court: I see.

Q. Also there are some matters that show much has been put in other funds, is that correct?

A. Yes, sir, there was one payment of \$8,000.00 received in our office August 3rd, 1955 and it was placed in our [50] advance payment account.

Mr. Bantz: I will offer at this time Plaintiff's 7 and 8.

Mr. Moore: We would object to the introduction, your Honor, inasmuch as they relate to 1948, 1949 and 1954, at this time as being immaterial.

Mr. Bantz: Your Honor, if we may reserve the right to offer them at a latter date when I connect them up to the other ones, although they are a part——

The Court: You have no objection to 8, I assume?

Mr. Bantz: 8 has 1954, your Honor.

The Court: Oh, I see, it has a subsequent year, in other words?

Mr. Bantz: Yes.

The Court: Well, you can make an identification of them and I will reserve ruling on them until further foundation has been laid.

Mr. Bantz: All right.

(Testimony of Leona M. Jones.)

Q. Now, Mrs. Jones, what does it mean when you have held in abeyance or held in your office for advance payment of some fund from a taxpayer, what does that mean?

A. Well, a taxpayer—it is held in a special fund if the tax has not been assessed as yet. If additional taxes are assessed they will pay in advance. It is placed in a special fund until such time as assessment is made. [51]

Q. And that is put into a fund where it is separate from the general income tax returns that you get?

A. Yes, sir.

Q. Now, I notice, and I asked you to bring over with you, and I am assuming that you checked it over, that Mr. Palermo has some money in the advance payment account, is that correct?

A. Yes, sir.

Q. And how much was that?

A. That was \$8,000.00.

Q. And that money is in a fund for future assessment?

A. Yes, sir.

Q. And for final determination between the taxpayer and the Internal Revenue office?

A. That is right.

The Court: I think you testified that that was paid in 1955, did you?

A. I believe that was the date. It was received for certification on August 3rd, 1955.

Mr. Bantz: You may examine, Mr. Moore.

(Testimony of Leona M. Jones.)

Cross-Examination

By Mr. Moore:

Q. From that \$8,000.00 suspense item, is it a correct assumption then that the Internal Revenue Service has not made a determination of Mr. Palermo's unpaid tax [52] liability up to the present time?

A. I would say that there has been no tax assessed up to the present time.

Q. That tax has not been assessed against him?

A. Yes, sir, that is right.

Mr. Moore: That is all.

Mr. Bantz: Your Honor, before she leaves I would like to ask permission that we may substitute at a later date photostats and the originals are to be returned to Tacoma, Washington.

The Court: That will be understood.

Mr. Bantz: All right, you may be excused.

The Court: That will be all.

GEORGE F. CHRISTENSEN

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please.

A. George Christensen.

Q. And, Mr. Christensen, where do you reside?

A. Stevenson, Washington.

(Testimony of George F. Christensen.)

Q. And where are you employed?

A. Bank of Stevenson. [53]

Q. And what is your position with the Bank of Stevenson?

A. The Manager.

Q. And how long have you been with the Bank of Stevenson?

A. Since 1948.

Q. All right. Are you familiar with the records and books and accounts of the Bank of Stevenson?

A. Yes, sir.

Q. Would you just tell me where is Stevenson located?

A. We are halfway between The Dalles and Portland, Oregon, and on the Columbia River Gorge, about twenty miles west of White Salmon.

Q. Twenty miles west of White Salmon?

A. Yes.

Q. Now, I believe that I had subpoenaed or had a subpoena issued to you to furnish some records at this trial?

A. Yes.

Q. Did you bring them with you?

A. I have them here.

The Clerk: Plaintiff's 9 and Plaintiff's 10.

Mr. Bantz: Would you stamp those together and make Plaintiff's 11.

The Clerk: Plaintiff's 11.

Mr. Bantz: Clip those together, would you please, Mr. Taylor.

The Clerk: Plaintiff's 12. Plaintiff's 13. [54]

The Court: 9 through 13?

The Clerk: Yes, your Honor.

(Testimony of George F. Christensen.)

Q. (By Mr. Bantz): Handing you Plaintiff's Exhibit for Identification No. 9, Mr. Christensen, would you examine that and tell what that is purported to be?

A. That is a record of a loan under a contract that Mr. Palermo had with the Bank of Stevenson.

Q. And this is from your files in the bank down at Stevenson? A. Yes, sir, that is correct.

Q. What year does that cover?

A. '40—July of '48 to November '49.

Q. Handing you Plaintiff's Exhibit 10 for Identification, would you please examine that?

A. This is savings account of Joe Palermo.

Q. I notice there is two sheets there. What does the top sheet purport to be?

A. That is a deposit slip.

Q. And what is the second sheet?

A. It is the record of the deposits and withdrawals.

Q. What year does that exhibit cover?

A. August 20, 1952, ending January 3, 1956.

Q. Handing you Plaintiff's 11, would you state what that is?

A. That is signature card for checking account of Joe Palermo.

The Court: Signature card? [55]

A. Signature card of checking account opened 6/28/50.

Q. What is the second item?

A. It is the checking account opened on December 23, 1953, the signature card.

(Testimony of George F. Christensen.)

Q. Is that checking account or savings account?

A. It is checking account.

Q. Both of them? A. Yes, both of them.

Q. Handing you Plaintiff's 12 for Identification, would you please state what that is?

A. These are a group of deposit tickets credited to the account of Joe Palermo's checking account.

Q. What is the account on there?

A. Joe Palermo, White Salmon, Washington.

Q. And for what years do they cover?

A. First deposit 6/28/50 and last deposit December 23, 1952.

Q. And handing you Plaintiff's 13 for Identification, would you please examine that?

A. This is the ledger sheets of the checking account for Joe Palermo from June 29, 1950 until it was closed June 19, 1957, closed by a service charge.

Q. And each of the exhibits that I have shown you, Plaintiff's 9 through 13 for Identification, are part of the official records of the Bank of Stevenson, is that correct? A. That is correct. [56]

Q. And did you check and see if you had any other records concerning Joe Palermo?

A. I checked but I could find none.

Q. You checked and you could find nothing further? A. Yes.

Q. Handing you Plaintiff's Exhibit 12 for Identification, is that a savings or checking account?

A. Checking account.

(Testimony of George F. Christensen.)

Mr. Bantz: Your Honor, I hope tomorrow we will have this speeded up but my witnesses weren't here with these but we are going to get together and counsel will see if we can speed it up a little bit better.

The Court: That is all right.

Mr. Moore: No objection to 10, 11, and 12.

Mr. Bantz: I am offering 10, 11, and 12.

The Court: All right, 10, 11, and 12 will be admitted.

(Whereupon, the said savings and checking account deposit slips and ledger sheets and signature cards were admitted in evidence as Plaintiff's Exhibits Nos. 10, 11, and 12.)

The Court: 13 runs up until 1957.

Mr. Bantz: I am going to have that explained, Your Honor. [57]

The Court: All right.

Mr. Bantz: I am not offering No. 9 at this time.

The Court: All right. Let me see those now.

Mr. Moore: No objection to 13.

The Court: I beg your pardon?

Mr. Moore: No objection to 13.

The Court: To 13?

Mr. Moore: Yes, to 13.

The Court: All right, it will be admitted then.

(Whereupon, said group of bank ledger sheets was admitted in evidence as Plaintiff's Exhibit No. 13.)

The Court: That is all but 9?

(Testimony of George F. Christensen.)

Mr. Bantz: Yes.

Q. Mr. Christensen, handing you Plaintiff's Exhibit 10, would you just tell me whether that is a savings account or——

A. That is correct.

Q. And when was that account opened?

A. August 20, 1952.

Q. And how much was it opened for?

A. \$10,000.00.

Q. And when was that account closed?

A. January 3rd, 1956. [58]

Q. And how much was in the account when it was closed?

A. \$10,606.76.

Q. Now, I notice on Plaintiff's Exhibit 10, we are talking about, there is some action on it, some credits, what is that for?

A. Those were interest payments.

Q. There was nothing else in the account but interest payments?

A. That is all.

Q. And the action or movements shown there are just interest payments put on there semi-annually by the bank?

A. Semi-annually, that is correct.

Q. Handing you Plaintiff's Exhibit No. 13, when was this account opened?

A. June 29, 1950.

Q. And, then, when was the account terminated?

A. June 19th of 1957.

Q. All right, now, referring you to the next to the last page and where the date is February 5th, 1953, do you see that?

A. Yes.

Q. At the bottom of the page?

A. Yes.

(Testimony of George F. Christensen.)

Q. There was a balance of \$144.00, is that correct?
A. \$144.65. It is \$144.65. [59]

Q. Yes, all right. The next is \$67.77?

A. That is correct.

Q. Dated February 13, 1953? A. Correct.

Q. Was there any other deposit after that time?

A. None.

Q. And were there any withdrawals, except for the closing withdrawal?

A. There seems to be two or three, yes, two ten dollar items and a five dollar item and \$55.00 item and another five dollar item.

Q. And when was the account closed?

A. June 19th, 1957.

Q. And he has no other accounts there at the present time?

A. No accounts there at the present time, no.

Mr. Bantz: You may examine.

Cross-Examination

By Mr. Moore:

Q. With reference to Identification 9, do you know what that is in reference to?

A. It is a record of either a loan or contract purchased in the name of Joe Palermo. It was indorsed by W. F. Larson, the dealer at Carson, Washington.

Q. The loan was indorsed?

A. It could be a contract or it could be a note with a [60] co-signer or indorser. The record doesn't

(Testimony of George F. Christensen.)

very explicitly say just what it was.

Q. You have no memory of it personally?

A. I had nothing to do with it.

Q. The record merely shows that that was an indebtedness and that was paid off?

A. That is correct.

Q. And who does it show paid it off?

A. No, it doesn't show who paid it off.

Mr. Moore: That is all.

Mr. Bantz: That is all, Mr. Christensen.

(Witness Excused.)

MARION BABB

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please.

A. Marion Babb.

Q. And, Mr. Babb, where do you reside?

A. White Salmon, Washington.

Q. And what is your position; where do you work at White Salmon?

A. Manager of the National Bank of [61] Commerce.

Q. And how long have you been with the National Bank of Commerce?

A. Since 1946. At White Salmon since 1951.

Q. Since 1951. And what has your position been with the bank since 1951?

(Testimony of Marion Babb.)

A. Assistant Cashier until 1953, and Manager since that time.

Q. And as Manager are you familiar with the bookkeeping and accounting system of your bank?

A. Yes, sir.

Q. And I take it you received a subpoena from me to produce certain records of Joe Palermo, is that right?

A. Yes, I did.

Q. And did you bring those records with you?

A. Yes.

Mr. Bantz: May I just have them.

The Court: That is 14?

The Clerk: Starting with Plaintiff's 14.

Mr. Bantz: Will you mark that Plaintiff's 15.

The Clerk: Yes, I am just giving you a beginning number. I will give you the last one.

Q. Mr. Babb, were these all of the records that you had concerning Mr. Palermo and his wife?

A. They are the records subpoenaed, sir.

Q. They are the records subpoenaed for the years of 1948 through 1953? [62]

A. That is right, sir.

Q. With the exception of one check item or one deposit slip?

A. One deposit slip and two other items. The signature card is part of that.

Mr. Moore: What was that Identification?

Mr. Bantz: The signature card that they overlooked. I will cover that in just a minute. I just mislaid it.

(Testimony of Marion Babb.)

The Clerk: The last number I have marked was 21, Your Honor.

The Court: All right.

Q. (By Mr. Bantz): Mr. Babb, handing you Plaintiff's Exhibit for Identification No. 14, would you please examine that and state what that is?

A. These are deposit tickets credited to the Joe Palermo account for the year 1948.

Q. 1948? A. Yes.

Q. And those were all of the tickets for that period and part of your official records at the bank?

A. Yes, sir.

Q. And as far as you know were all of the deposit slips that you have had for the year 1948?

A. Yes, as far as I know.

Q. Handing you Plaintiff's 15 for Identification, would you [63] please examine that?

A. Those are deposit tickets for the year 1949, credited to the account of Joe Palermo.

Q. And these are from your official records?

A. That's right.

Q. And to the best of your recollection all of your deposit slips that you had at the bank?

A. Yes, that's right.

Q. Now, handing you Plaintiff's Exhibit for Identification, No. 16, would you please examine that exhibit?

A. These are deposit tickets for the year 1950, credited to the account of Joe Palermo.

Q. And those were brought from your official records at the bank? A. Yes, sir.

(Testimony of Marion Babb.)

Q. To the best of your recollection are those all of the records for the year 1950 that you have concerning deposit slips? A. They are.

Q. Handing you Plaintiff's 17, would you please examine that and state what that purports to be?

A. These are deposit tickets for the account of Joe Palermo for the year 1951.

Q. And those are from your records?

A. They are, sir. [64]

Q. And to the best of your recollection all of the deposit slips for the year 1951?

A. They are.

Q. Handing you Plaintiff's No. 18, would you please examine that. If you recognize it, state what it is?

A. These are deposit tickets for the year 1952 for the account of Joe Palermo.

Q. And they are from your official records?

A. They are, sir.

Q. And to the best of your knowledge all of the deposit slips that the bank had for the year 1952? A. They are.

Q. Handing you Plaintiff's No. 19 for Identification, would you state what that is? Would you please examine that and if you know, state what it is?

A. These are deposit tickets for the year 1953 for the account of Joe Palermo.

Q. And those are from your official records?

A. They are, sir.

(Testimony of Marion Babb.)

Q. And they are all of your deposit slips to the best of your knowledge for the year 1953?

A. There was one deposit ticket missing for July 20, 1953.

Q. We can take that up later on and determine that by looking at the statements?

A. Yes, we can. [65]

Q. In other words, Plaintiff's 16, 17, 18, 19 for the years 1950; 1, 2, and 3; all of the deposit slips are there except for the one, is that correct?

A. Yes, except for the one.

Mr. Bantz: Your Honor, I am going to offer Plaintiff's 16, 17, 18, 19 at this time covering the four indictment years.

Mr. Moore: I note, Mr. Babb, that for 1950 his deposit slips are headed up "Security State Bank." That was the name of the bank before it was taken over by the National Bank of Commerce?

A. It was taken over by the National Bank of Commerce in 1950.

Q. (By Mr. Bantz): The records of the Security State Bank are the records of the National Bank of Commerce? A. Yes.

Q. And they assumed the records?

A. Yes.

Mr. Moore: Well, as I understand it, what these deposit slips will show are all the deposits from 1950 to 1953 relating to the deposits of Joe Palermo?

A. Yes, to the best of my knowledge.

Mr. Moore: We have no objection.

(Testimony of Marion Babb.)

The Court: They will be admitted. 16 to 19, inclusive, is that right?

The Clerk: Yes, 16 through 19. [66]

(Whereupon, the said deposit slips were admitted in evidence as Plaintiff's Exhibits 16, 17, 18, and 19.)

Q. (By Mr. Bantz): Now, handing you 20 and 21, do you recognize those? A. Yes, I do.

Q. What is Plaintiff's 20?

A. It is a signature card for the checking account of Joe and Bertha Palermo for December 19, 1949. There is another one for Joe and Bertha Palermo dated October 13, 1942, I believe, for the Security State Bank.

Q. Those were the two cards you had in your bank concerning authority to cash checks and use the account in the bank? A. Yes.

Q. And Plaintiff's 21, would you examine that and if you recognize it state what it is?

A. Signature card for Joe Palermo and Bertha Palermo, dated March 25, 1954, for the National Bank of Commerce.

Q. And is that card still in effect at your bank?

A. Yes, sir, it is.

Q. And up until, and through, 1953 these cards were being used by your bank, that is Plaintiff's Exhibit 20? A. That's right.

Mr. Bantz: I will offer Plaintiff's 20 and [67] 21. Your Honor.

(Testimony of Marion Babb.)

Mr. Moore: No objection, Your Honor.

The Court: Admitted.

(Whereupon, the said signature cards were admitted in evidence as Plaintiff's Exhibits 20 and 21.)

Mr. Bantz: Would you mark that for identification, please?

The Clerk: Plaintiff's 22.

Mr. Bantz: And will you please mark these additional ones as the next exhibit.

The Clerk: Plaintiff's 23.

Mr. Bantz: Your Honor, I want to call attention that I am not at this time offering 14 and 15 for identification.

Q. Mr. Babb, handing you Plaintiff's Exhibit No. 22 for identification, will you please examine that and if you recognize that tell the court and jury what it is?

A. That is a checking account ledger sheets for Joe and Bertha Palermo for the Security State Bank from June 2, 1947, through November 23, 1949.

Q. All right, now, those records you have in your hand are part of the official records of your bank?

A. They are.

Q. And you brought them here with you? [68]

A. I did.

Q. And it starts with the year 1947 and ends in 1949?

A. That's right.

Q. On this Plaintiff's 22, is that the only record that you have of the checking account during that

(Testimony of Marion Babb.)

period of 1947 through 1949? A. It is.

Q. And all of the checks deposited or drawn would show on this account for those years?

A. They would, yes.

Q. Handing you Plaintiff's 23 for Identification, would you please examine that exhibit?

A. It is a group of checking account ledger sheets for Joe and Bertha Palermo from November 25, 1949, through December 31st, 1953.

Q. And that is from your official records and files at the bank? A. It is.

Q. And part of the records that were brought here with you? A. It is.

Q. Turning the first page of Plaintiff's 23 over, I have drawn a line there on the date of January 3, 1950, is that correct? A. Yes, that's right.

Q. And that is on Plaintiff's 23? [69]

A. That's right.

Mr. Bantz: All right. If Your Honor please, before I ask that this be admitted I have part of one statement with the year 1949 on one side, and on the back I have drawn a line separating 1950, and with the Court's permission I would like to submit the exhibit with the understanding that we will take the portion belonging to 1949 and attach it to Exhibit 22 which is the years of 1947 to 1949.

The Court: All right.

Mr. Bantz: And make it 22B if that is agreeable with you.

The Court: Yes.

Mr. Bantz: Is that agreeable with counsel?

(Testimony of Marion Babb.)

Mr. Moore: Fine.

Mr. Bantz: And then with that understanding I will then offer 23.

The Court: Let me see, 22 hasn't been offered?

The Clerk: No, sir.

Mr. Bantz: In other words, Your Honor, Plaintiff's 23 will be for the years '50 through '53, inclusive?

The Court: I see.

Mr. Moore: No objection on that basis.

The Court: All right.

(Whereupon, said ledger sheets were admitted in evidence as Plaintiff's Exhibits 22 and 23.) [70]

Q. Mr. Babb, handing you Plaintiff's Exhibit 23 and referring to the page which has the date of July 20th, 1953, you see where I am reading from?

A. Yes.

Q. That deposit here shows \$6468.58?

A. That is correct.

Q. Now, a few minutes ago I asked you about the deposit slip, for the year 1953, that was missing?

A. Yes, that is correct.

Q. And do you know whether they found it at the bank? A. I do not know.

Q. But that is on your records and it shows that there was a deposit of \$6468.58?

A. Yes, sir.

Q. And I am asking you if you do find it to forward the deposit slip to my office, is that correct?

(Testimony of Marion Babb.)

A. Yes.

Q. You will do that? A. Yes.

Mr. Bantz: Your Honor, I asked counsel if that deposit slip was delivered to me if we could stipulate it in through the testimony of Mr. Babb, if he could produce that, and he has agreed to if we could produce it.

The Court: All right.

Mr. Bantz: Would you mark each of those [71] papers separately, Mr. Taylor. This one first.

The Clerk: Plaintiff's 24 and 25.

Q. Mr. Babb, handing you Plaintiff's No. 24, would you please examine that and if you recognize it would you state what it is?

A. It is a financial statement dated April 3, 1954, given by Joe Palermo.

Q. And that is from your official records of the National Bank of Commerce at White Salmon?

A. It was given to the Security State Bank, yes.

Q. And who did you get that from?

A. It was signed Joe Palermo.

Q. And did you bring that exhibit with you, Plaintiff's No. 24 for Identification?

A. I did, sir.

Q. And handing you Plaintiff's Exhibit No. 25 for Identification, would you examine that exhibit and if you recognize it state what it is?

A. It is a financial statement dated March 3, 1948, signed by Joe Palermo and given to the Security State Bank.

(Testimony of Marion Babb.)

Q. And did you bring that with you from your official records? A. Yes, I did.

Q. I believe, Mr. Babb, you stated that Plaintiff's No. 24 was 1954. Is that 1954 or 1944? [72]

A. I am sorry, it is April 3rd, 1944.

Q. Thank you. Mr. Babb, do you have any liability ledgers or any other records for the years of 1948 through 1953, in the bank?

A. Yes, liability ledgers.

Q. You did have some liability ledgers?

A. Yes, sir.

Q. What do you mean by liability ledgers?

A. Well, it would show the amount of liability, the amount due to the bank by Mr. Palermo or by a customer.

Q. By customers? A. Yes.

Q. Did he have an account there through the years '50 to '53?

A. Do you mean a liability account?

Q. Yes, a liability account.

A. I do not believe he did, sir.

Q. Calling your attention to Plaintiff's Exhibit No. 23, which is the—Now, what are these called?

A. Checking account ledger sheets.

Q. Checking account ledger sheets. Referring to the date of April 10th, 1953, will you tell me what the balance of cash on hand in the bank is by Mr. Palermo?

A. On April 10th, 1953, the balance was \$57,-527.82.

Q. Now, during the years of '50 through '53,

(Testimony of Marion Babb.)

which Plaintiff's [73] Exhibit 23 covers, would this exhibit include all deposits and all withdrawals of the checking account of Mr. Joe Palermo and his wife? A. It does, sir.

Q. And I assume on here that from the exhibit that Mrs. Palermo could write checks also?

A. Yes, sir.

Mr. Bantz: Mr. Taylor, did I get admitted the signature cards of Mr. and Mrs. Palermo?

The Clerk: Yes, you did, Exhibits 20 and 21.

Q. Mr. Babb, do you have any other records at the bank that you know of from the years 1950 through 1953? A. Not to my knowledge.

Q. Not to your knowledge? A. No.

Mr. Bantz: You may examine, Mr. Moore.

Cross-Examination

By Mr. Moore:

Q. With reference to Identifications 24 and 25, Mr. Babb, being financial statements, I assume you had nothing to do with the taking of either one of those, is that correct? A. I did not, sir.

Q. You merely found those in the bank files?

A. These were in the bank files. [74]

Q. And the purpose for which the statements were given is unknown to you of your own personal knowledge ?

A. Well, I would assume that they were a loan but I don't know.

Q. Do you know whether a loan went through on either one of them?

(Testimony of Marion Babb.)

A. I am sure about '44 but I am not certain about 1948.

Mr. Moore: I see. Thank you.

The Court: Any redirect?

Mr. Bantz: No, Your Honor.

The Court: The court will recess for ten minutes.

(Whereupon, after the afternoon recess, proceedings were resumed as follows:)

Mr. Bantz: Mr. Bates?

MATTHEW BATES

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please.

A. Matthew Bates.

Q. And where do you live, Mr. Bates?

A. At White Salmon.

Q. And what is your occupation? [75]

A. I am in the Insurance and Real Estate business with my father.

Q. And what is your father's name?

A. Richard Bates.

Q. How long have you lived at White Salmon?

A. I lived there all of my life.

Q. Have you assisted your father in the past in making out income tax returns?

(Testimony of Matthew Bates.)

A. I have.

Q. What did you do to assist your father?

A. I do the copying after he prepares the returns.

Q. What do you mean by "Copy"?

A. Type copies.

Q. You type it up?

A. Yes, I type it up, that's right.

The Clerk: Plaintiff's 26 through 30.

Mr. Bantz: Your Honor, I would like to take a moment to explain that I am using Mr. Bates to identify some documents. I might say his father is an elderly gentleman back here and he had some cataracts removed from his eyes. I am not having him testify as to the facts but as to the handwriting only.

The Court: All right.

Mr. Bantz: I thought I better make that explanation to you. [76]

The Court: Yes.

Q. Handing you Plaintiff's Exhibit 26 for Identification, would you please examine that, Mr. Bates. Have you seen that before?

A. Yes, sir.

Q. And do you recognize the handwriting on the front?

A. No.

Q. Do you recognize the handwriting on the second page?

A. Yes, that is my father's handwriting.

Q. That is your father's handwriting?

A. Yes.

Q. And how about on the third page?

(Testimony of Matthew Bates.)

A. That is my father's handwriting.

Q. Handing you Plaintiff's Exhibit No. 27 for Identification, would you please examine that exhibit. Have you seen that before?

A. Yes, I have.

Q. And where have you seen it?

A. In my father's office.

Q. And there is a group of pages to begin with here, is that your father's handwriting or not?

A. It is.

Q. That is your father's handwriting?

A. Yes, it is.

Q. Now, there are two ledger sheets at the end of that; is [77] that your father's handwriting there?

A. It is.

Mr. Moore: Did he say that they were?

Mr. Bantz: Yes, he said that they were.

Q. Handing you Plaintiff's Exhibit 28 for Identification, will you examine that please. Do you recognize that?

A. No.

Q. Is that your father's handwriting?

A. It isn't my father's handwriting.

Q. It isn't your father's handwriting. Now, in back of Exhibit 28 is a large sheet, is that your father's handwriting?

A. It is.

Q. And this purports to have a date on it of 1951?

A. Right.

Q. Now, handing you Plaintiff's Exhibit 29 for Identification, will you examine that, please. Is your father's handwriting on there anywhere?

A. Yes, sir.

(Testimony of Matthew Bates.)

Q. That is the large sheet on the back of that exhibit? A. Yes, right.

Q. And on the front page, is that his handwriting? A. Yes.

Q. Then, there is a small second sheet and third sheet. Is that your father's handwriting? [78]

A. No.

Q. Now, handing you Plaintiff's Exhibit No. 30 for Identification, will you please examine that? Is that your father's handwriting? A. No.

Q. Do you recognize the handwriting?

A. Not as by my father, no.

Mr. Bantz: May I have Exhibits 3, 4, 5, and 6, please.

The Court: Did the witness testify as to 27? If he did I missed it.

Mr. Moore: Yes, he did.

The Court: Did he identify the handwriting?

Mr. Moore: He said the first group and the two ledger sheets were in his father's handwriting.

The Court: Thank you.

Q. (By Mr. Bantz): Handing you Plaintiff's 27, you did testify about that, is that correct?

A. Yes.

Q. Now, Mr. Bates, handing you Plaintiff's Exhibit No. 3, which is income tax return of 1950, at the bottom is the signature "R. J. Bates" with the date of February 15, 1951; is that your father's signature?

A. Yes, that is my father's signature.

Q. That is your father's signature?

(Testimony of Matthew Bates.)

A. Yes. [79]

Q. Did you type that income tax return?

A. 1951, no, sir.

Q. You didn't type that one? A. No.

Q. But that is your father's signature?

A. Yes.

Q. Referring to Plaintiff's Exhibit 3, where the signature is it reads, "Signature of person, other than taxpayer, preparing this return." Is that correct? A. Right.

Q. Handing you Plaintiff's Exhibit 4, which is the income tax return of Joe and Bertha Palermo for the year 1951, would you please examine that and see if your father's signature appears on there?

A. It does.

Q. And it appears in the place where it says, "Signature of person, other than taxpayer, preparing this return"?

A. That is correct.

Q. And what is that date?

A. February 9, 1952.

Q. Do you recall if you typed that return?

A. It is very possible that I did. My mother was also in the office at that time.

Q. All right, now, handing you Plaintiff's Exhibit 5, which is the income tax return of Joe and Bertha Palermo for [80] the year 1952. Would you please examine that and see if your father's signature appears on the face of that?

A. Yes, it does.

(Testimony of Matthew Bates.)

Q. And does it appear in the same place as the other tax returns? A. Yes, sir.

Q. And what is the date of that?

A. January 28, 1953.

Q. And handing you Plaintiff's Exhibit No. 6, which is the income tax return of Joe and Bertha Palermo for the year 1953, would you see if your father signed that one? A. He did not.

Q. He did not sign that one? A. No.

Q. Is it dated at that place?

A. Yes, February 25, 1954.

Q. And do you recall if you typed that one up?

A. Yes, I did.

Q. And was that prepared in your office?

A. Yes.

Q. And how did you receive the figures and information to put on that income tax return?

A. Oh, Mr. Palermo usually brought us in a—
Mr. Moore: I can't hear you.

A. Mr. Palermo usually brought us a statement on a piece [81] of paper, a statement of his expenses and receipts.

Q. And your father worked them over?

A. That is correct.

Q. And then did your father give them to you?

A. He would prepare a pencil copy of the return and I would make the typewritten copy.

Q. Is there any reason why you recognize the 1953 return?

A. Yes, sir, that was done on our L. C. Smith.

(Testimony of Matthew Bates.)

That is the only typewriter that is in the office and I would recognize it anyplace. I am the only one that does any work on that.

Mr. Bantz: You have got to keep your voice up now.

Q. Now, Mr. Bates, when did you or your father start preparing income tax returns of Mr. Palermo?

A. It would be 1949 for the year of 1948.

Q. Are you still doing the returns?

A. For Mr. Palermo?

Q. Yes. A. No.

Q. When was the last year you prepared the returns?

A. That would be 1954, for the year of 1953.

Mr. Bantz: You may examine.

Cross-Examination

By Mr. Moore:

Q. Were you present when your father first was contacted [82] by Mr. Palermo concerning the doing of his income tax returns? A. In 1948?

Q. Yes.

A. No, I was in high school at that time.

Q. Were you present during the years 1951, 1952, 1953, and 1954 when Mr. Palermo came in to see your father about having him do his '50, '51, '52, and '53 returns?

A. I was in the army during 1951 and so I would have been there during '52, '53, and '54.

Mr. Bantz: I didn't hear. Could not have been there?

(Testimony of Matthew Bates.)

A. No, I would have been there during the year 1952.

Q. (By Mr. Moore): Do you recall whether or not during those years your father discussed with Mr. Palermo the information that he gave him to make up his income tax returns?

A. Yes, I am quite sure that he did. He would go over the statements that Mr. Palermo would present to him and determine, of course, what was to go and what wasn't.

Q. Did he ever ask him to go and get further information, that you know of?

A. I don't know.

Q. Did he ever ask him in your presence to bring in his books? A. No.

Q. Or his cancelled checks or his bank statements? [83] A. No. No.

Q. Do you know approximately how long your father would have worked in 1952, 1953, or 1954 in the compilation of figures doing Mr. Palermo's income tax returns?

A. I don't really know excepting that it was nothing out of the ordinary.

Q. Would he be able to do them in a day?

A. A day of steady work.

Mr. Moore: I think that is all.

Mr. Bantz: That is all. Would you bring your dad up here, please.

(Witness excused.)

RICHARD J. BATES

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please.

A. Richard J. Bates.

Q. And where do you reside, Mr. Bates?

A. My home is at White Salmon, Washington, near White Salmon, Washington.

Q. And how long have you lived there?

A. Forty-nine years.

Q. And what is your occupation? [84]

A. Well, for—I have always had a little farm since I have been there and I am in the insurance and real estate business.

Q. And have you been in the past years doing income tax work? A. I beg your pardon?

Q. Have you prepared income tax returns in the past; I mean during the last twenty years have you been doing it? A. Yes.

Q. Will you tell the Court and the jury when did you start making out income tax returns?

A. Well, I made out, of course, my own in 1913 and I started doing the public work in 1936, I think it was.

Q. And did you make out income tax returns for the Year of 1948 through 1953? A. I did.

Q. And through 1954? A. I did.

Q. Have you made out income tax returns for Joe Palermo?

(Testimony of Richard J. Bates.)

A. I made out—I think it was in 1948 or 1949 when Joe—when I started making them out for Joe Palermo, and the last one was in—it would be in 1954, I think it was.

Q. You were paid by Mr. Palermo to make out his income tax returns? A. I was. [85]

Q. For the years of 1950 through 1954, do you recall you were paid each year?

A. I was what?

Q. Were you paid each year from 1950 to 1954?

A. I was.

Q. Do you recall how much?

A. Well, it was varied. Earlier it was less money and the last two times I think Joe paid me \$20.00.

Q. You know Mr. Palermo, do you?

A. Yes, I do.

Q. Are you having a hard time seeing now, Mr. Bates? A. Very much so.

Q. You just had some work done on your eyes?

A. I just had a cataract removed from my right eye, and I have a cataract on my left eye.

Q. I won't ask you if you can't see; is Mr. Palermo in the courtroom, do you know?

A. I asked my son if Joe was here and he told me he was.

The Court: No, you can't repeat that.

Mr. Bantz: That is all right. If you can't see him, don't tell. I don't want to know what your son tells you. You just keep within what you know.

Q. Mr. Bates, how many income tax returns a year have you generally done in the past ten years?

(Testimony of Richard J. Bates.)

A. It would average around 150. [86]

Q. 150 a year? A. Separate ones.

Q. And who do you do those for anyway, Mr. Bates? Do you do them for ordinary people like ranchers, fishermen and so forth?

A. Farmers, loggers and merchants.

Q. In that locality where you live?

A. Yes.

Q. Down around Bingen mostly?

A. Yes; White Salmon and the surrounding country.

Q. Where is your office, Mr. Bates?

A. Bingen.

Q. Bingen, Washington? A. Yes.

Q. Now, we have in evidence some income tax returns that were prepared by you for the years of 1950 through 1953 that have been identified by your son. Did you hear him testify?

A. I heard him at a distance. I heard him say—give the answers partly, not all of his answers.

Q. Did you prepare the income tax returns of Mr. Palermo for the years 1950, '51, '52, '53?

A. I did.

Mr. Bantz: You will excuse me if I stand here, will you, your Honor, while I talk to him? [87]

The Court: That is all right.

Q. Did you also prepare his income tax return for the year 1954, or do you recall?

A. I don't recall. This is '55, '56—I don't recall.

(Testimony of Richard J. Bates.)

Q. Did you prepare an income tax return for him in 1949? A. I did.

Q. Now, Mr. Bates, I asked you to bring some papers to me at the Grand Jury of which you delivered to me certain papers, and I am going to hand them to you by exhibit—I don't know whether you can read them but I will try and have you look at them. Now, first, I will hand you Plaintiff's Exhibit 26 for Identification, which your son stated that the last two pages had your handwriting and figures on it. Now, I don't know, can you see the paper at all?

A. Oh, yes; I can see the paper. I can see the writing, I might say. This doesn't look like mine.

Q. All right; that isn't yours? A. No.

Q. All right; on Plaintiff's Exhibit 26 for Identification there is a marking of "1949." Can you see the "1949"? A. Yes; I see it.

Q. Is that your writing?

A. It looks like my writing.

Q. And then at the bottom of it is the name "Joe Palermo," [88] can you see that?

A. Yes. Yes; that is not mine.

Q. That is not your writing? A. No.

Q. All right. Now, handing you Plaintiff's Exhibit 27 for Identification, your son testified that certain papers in the front were your handwriting?

A. I can see those. Those are.

Q. Can you see those?

A. Yes; I can see. Yes; they are.

Q. Then there are some other matters in here,

(Testimony of Richard J. Bates.)

and there it says, "Received From Joe Palermo." Can you see that?

A. Yes; I can see it. I can't see what is written.

Q. And on the top of the paper for the year, "1950—Joe Palermo." Now, each year, Mr. Bates, for the years 1950 and 1951, did Mr. Palermo bring you in work sheets? A. Yes; he did.

Q. Did you use those work sheets in making up your income tax return? A. Yes; I did.

Q. And did you do the same for the years of 1952 and 1953? A. Yes, sir.

Q. Now, handing you Plaintiff's Exhibit No. 29 for Identification, your son testified that the first page had your handwriting on it and the last page. Now, looking at [89] the second page here, can you see any writing on there?

A. Yes; I can see the writing. It isn't my writing.

Q. It isn't your writing? A. No.

Q. Now, on the back page there is certain writing. Can you recognize that?

A. That might be my writing there, that is not. That is in there.

Q. On the second page of that it says, "Trk 8500," that is different writing?

A. Yes; I was taking that for depreciation.

Q. You were taking that for depreciation?

A. Yes.

Q. Now, can you recognize these sheets as part of the paper or the paper that was brought into you by Mr. Palermo? A. Yes.

(Testimony of Richard J. Bates.)

Q. Now, handing you Plaintiff's 30 for Identification, would you see if you can see that at all?

A. It isn't my handwriting.

Q. It isn't your handwriting? A. No.

Q. Now, is this your writing up on top here where it has "Joe Palermo 53"? A. Yes, sir.

Q. All right. Then, in a different writing it says, "On 4 [90] houses." Can you read that?

A. It looks a little bit like my writing. It isn't very plain.

Q. Now, looking on the back on the second sheet it says "Rented houses" in pencil. Can you see that?

A. Yes.

Q. And now there are circles around certain figures, did you——

A. That was the gross on his rented houses.

Q. All right. Now, that is for the year 1953. When Mr. Palermo brought in these figures did you use those in the preparation of his income tax return? A. Yes; I did.

Q. Is that true with the years of 1949, 1950, 1951 and 1952?

A. Those are the ones that I looked at, yes.

Q. And to the best of your knowledge are these the only papers that you have that he gave to you?

A. Yes.

Q. I notice in here, Mr. Bates, one of these years, I believe the year 1952 there is, at least not obvious to me, a writing by Mr. Palermo; how would you have obtained that information?

A. It may have been lost in my office.

(Testimony of Richard J. Bates.)

Q. But do you recall if you had a statement with the figures on that you used on the income tax return for Mr. Palermo? [91]

A. I would have used one.

Q. He would have given you one? A. Yes.

Q. Now, tell me, did you always discuss each of the year's sheets that he turned over to you in connection with his income tax return?

A. I have always had a discussion with him when he came in.

Q. Did he sit down and you talk about the depreciation or any other things concerning his income tax return? A. Yes. Yes.

Q. Did he generally come to your office?

A. He did.

Q. When the income tax return was signed, do you recall where that income tax return was signed?

A. Nearly every time—every time I knew, they came and signed them at the office, there may have been one that he took away but they signed them at my counter in my office.

Q. Now, did you go over the income tax returns together at the time they signed them?

A. No; I didn't.

Q. Did you discuss with Mr. Palermo what his gross income and expenses were on the income tax return, Mr. Bates?

A. I always ask a customer if that is all that they had of income. Quite often I find from my own experience that [92] they were entitled to other de-

(Testimony of Richard J. Bates.)

ductions which I gave them, like some of them failed to report depreciation. I always wanted to be sure that they had that depreciation allowed.

Q. Did you discuss this matter with Mr. Palermo about other income?

A. I did. I remember one time that he had a house or one or two houses, rather, and I asked him about that and he said, "Oh, sure, I forgot that."

Q. You knew that he had rental houses as well as the logging business? A. Yes. Yes.

Q. Did you talk to Mr. Palermo about filing estimates, Mr. Bates?

A. I am sure that I did. I always did tell every—every client that he had to make out an estimate.

Q. Now, you have done other income tax returns for small loggers or loggers that work around there—around your community, is that right?

A. That's right.

Q. Mr. Bates, did you rely on the records that Mr. Palermo turned over to you in the making out of his income tax return? A. I did.

Q. And did you make any large changes or appreciable changes [93] in those sheets that he turned over to you? A. No; I did not.

Q. Would there be any change, maybe some change on depreciation or something on there?

A. Well, I just don't recall that. If there was, it was very small.

Q. Did you make any changes to his gross income or expenses? A. No.

Q. What was your answer?

(Testimony of Richard J. Bates.)

A. No. Not material.

Q. Not material? A. No.

Q. All right. Mr. Bates, do you think you could see the income tax returns if I gave them to you; could you read those?

A. I don't believe so.

Q. You don't believe so?

A. I might recognize some of it; not the figures very well.

Q. Now, did Mr. Palermo bring any books or records into you other than what we have been discussing? A. No, sir.

Q. Did he bring any checks into you?

A. No.

Q. Did he bring any cancelled checks in to you?

A. No; he did not. [94]

Q. Now, did you ask him for any?

A. I did not.

Q. You made up his return from what he turned over to you? A. Yes.

Q. To the best of your knowledge, Mr. Bates, do the figures that are on these sheets, work sheets that are here, do they compare closely or exactly with those on the income tax return that you made up?

A. As close as I could make them.

Q. As close as you could make them?

A. Yes.

Q. Now, you say that he might have come to your house to sign the income tax return; do you mean your house or your office?

(Testimony of Richard J. Bates.)

A. He did not come to my house. I don't recall any time. It was always in my office.

Q. Now, your office, do you have a private office there yourself?

A. I have a room in the back of the main office, yes.

Q. Did he go back there or in front?

A. He signed them at the counter. He always came to the back office when we made them out.

Q. All right; he would come to the back office when you made the returns out? A. Yes. [95]

Q. Was Mrs. Palermo with him when he signed the returns?

A. Yes. I recall her being there a couple of times, yes.

Q. To your knowledge, did he ever file any estimates? A. Any what?

Q. Any estimates. Did he file any estimates?

A. Not to my knowledge. Not to my knowledge.

Q. Mr. Bates, did you handle his income tax return in the ordinary course of your other income tax return business? A. I did.

Q. Did you have any other business with Joe Palermo?

A. Oh, I have sold some land for him once.

Q. When was that, do you recall?

A. That was last year, I believe, yes.

Q. Last year, 1956?

A. 1956, I believe, yes.

Q. Did you have any insurance business with

(Testimony of Richard J. Bates.)

him? A. No insurance, no.

Q. In other words, other than the land your only business with him was the income tax business?

A. Yes.

Q. When Mr. Palermo came in to sign the returns, Mr. Bates, did he know or did you have any discussion of how much tax he was paying?

A. No.

Q. Did you show him on the return how much tax he had to pay? [96]

A. I don't recall of showing him because he knew where to find it.

Q. He knew where to find it?

A. Yes; I am sure of that. May I add one thing, too?

Q. Is it to a question I asked? A. Yes.

Q. All right. You asked me a few moments ago about my writing insurance and so on. I have written licenses. I don't do that work but Mat does it for different loggers that come and I think we have written the licenses for Joe at different times.

Mr. Bantz: That is all right. Your Honor, at this time I will offer in evidence Plaintiff's 27, 28, 29, and 30, which are the work notes of Mr. Bates concerning the years 1950, '1, '2, '3, and I don't know whether counsel has seen them or not.

The Court: Better let him look at them.

Mr. Velikanje: Is that No. 27 for '50 or '52?

Mr. Bantz: 27 is for '52.

Mr. Velikanje: 28, '51?

Mr. Bantz: No. 27 is '50. It was covered up, I

(Testimony of Richard J. Bates.)

am sorry. It has got marked "50" on it. Your Honor, I will reserve the over so that we can look at these after court if there is any question about it. It appears one sheet should have been on one of the others. Your Honor, in order [97] to have the identification I could have Mr. Bates come down and look at Mr. Palermo here or have the right of calling young Mr. Bates, whichever you want me to do.

Mr. Moore: I don't think there is any question that he is sitting beside me.

Mr. Bantz: For the record, I would like to have some identification here.

The Court: Well, you can have the young man come up and identify him.

Mr. Bantz: All right; you may inquire.

Cross-Examination

By Mr. Moore:

A. Mr. Bates, when did you first become acquainted with Mr. Palermo?

A. I am not sure whether it was the first year I worked for him or I met him at the Eagles Lodge.

Q. You and Mr. Palermo are both members of the Eagles Lodge? A. What?

Q. You and Mr. Palermo are both members of the Eagles Lodge at White Salmon?

A. I am.

Q. And he is too? A. I believe so.

Q. Going back over these information sheets, Mr. Bates, when Joe first came into your office to

(Testimony of Richard J. Bates.)

have you make [98] the income tax return, did you tell him what you wanted him to bring in?

A. I just cannot remember whether I used those words or not. It is a good many years ago.

Q. You don't recall whether he came in with the information?

A. I am sure he brought them in. I am sure he brought them in.

Q. He brought information in?

A. Some information, yes.

Q. And in the course of your doing his income tax returns in these various years did you ever inquire further as to certain income items or expense items?

A. He always gave me the gross—his gross earnings and I worked it down from that.

Q. If there was going to be something included in his tax return as an expense, did you make the determination of whether it was a legitimate expense or not?

A. I did.

Q. And in setting up the depreciation schedule did you determine what period of time a certain piece of equipment would be depreciated?

A. I did.

Q. Did you ever discuss with him whether or not certain items might or might not be income?

A. Might not or be income?

Q. Yes. [99]

A. I—I don't remember of his having anything of that kind.

Testimony of Richard J. Bates.)

Q. I believe on Identification 26 the testimony was that the first page was somebody else's writing and the last two pages were yours? A. Yes.

Q. Now, this last page that I am showing you is your writing? A. Yes; that is my writing.

Q. Now, I note on the first page is marked "1949" up here in the corner?

A. That is mine.

Q. And you can't see underneath here, it says, "Gross Earnings" in somebody else's writing, \$40,-31.64, that is on the first page. That is not your writing, \$40,200.00, roughly, and on the last page is written \$48,670.37. Now, do you recall in 1949 where that change might have come from?

A. I evidently used the 1948.

The Court: The witness will have to speak up a little bit louder. I am sure that the jurors can't hear.

Mr. Moore: Yes.

Q. Do you recall where that came from?

A. No; I do not. I do not.

Q. Did you ever request from Mr. Palermo anything more than these slips of paper?

A. I have no recollection of asking him for more. I made [100] deductions though from his statement, I remember, for some money that he loaned to a private fellow for a loan which I told him wasn't deductible.

Q. When he came in each year, did you discuss with him what pieces of equipment he may have acquired or sold in the previous year?

(Testimony of Richard J. Bates.)

A. Yes; he always kept me posted, I thought.

Q. He brought you that information?

A. I thought he always kept me posted, yes.

Q. You have done income tax returns for other loggers?

A. I can't hear you.

Mr. Moore: Too much bounce.

Q. You have done other income tax returns for other loggers in that area?

A. Oh, yes; quite a number.

Q. On the basis of Mr. Palermo's activities down there, did it appear to you when you were making out his income tax returns that his gross earnings and his expenses and his net earnings were reasonable for the activities that he was then carrying on?

A. Yes. Yes; he was—he was one of the larger operators. That is when I say "logger," I mean they fall and buck as well as own some forest there. Fallers and buckers run with the fellows that are really loggers and they do light trucking, and Joe was one of the larger ones. [101]

Q. And on the basis of what he was doing his gross appeared reasonable?

A. Yes; larger than most of them.

Q. Well, on the basis of that gross did his net appear to be reasonable?

A. Well, he had a lot of expenses. His expenses grew up as well but I would say yes.

Q. You say you have known Mr. Palermo since about 1948, roughly?

A. Since 1948 or 1949, roughly.

(Testimony of Richard J. Bates.)

Q. And are you acquainted with his reputation in the vicinity of White Salmon and Bingen?

A. I have never heard anything detrimental against him.

Q. You have never heard anything against Mr. Palermo at all? A. I beg your pardon?

Q. You have never heard anything against Mr. Palermo at all?

A. No; I have never heard anything against him.

Q. Do you know whether or not he has a reputation for honesty in that area?

A. As far as I knew.

Q. Did you know anything about Mr. Palermo's work; in other words, what he personally did in the operation of his business?

A. Well, he seemed to be a successful logger, that is more than you can say about some of [102] them.

Q. Do you know whether or not he was a hard-working logger?

A. Well, I have never seen him in the woods and so I don't know.

Q. I see. These amounts that Joe paid you to do his income tax return, he would bring the information in and you would make up the return and then tell him how much he owed?

A. Yes; that's right.

Q. And then he would pay you according to how much you said it was worth, is that right?

A. Yes. Yes.

(Testimony of Richard J. Bates.)

Q. In making up income tax returns you said you do about 150 a year? A. Yes.

Q. Do you do all of the returns——

A. I beg your pardon?

Q. Do you make all of these returns in about the same way? A. Yes.

Q. In other words, you rely on what the people bring and then you make up the returns from that?

A. Some of them bring in their books, that is their expense books and I use that the same as the sheets of paper.

Q. Some of those people who bring in the expense books, or the books and records, do they bring them in at your request or do they just bring [103] them in?

A. No; they just bring them in. They have been bringing them in for years.

Q. You have never asked anyone to bring them in? A. No.

Mr. Moore: I think that is all.

Redirect Examination

By Mr. Bantz:

Q. Mr. Bates, you reported on the income tax return of Joe Palermo the income that he told you that he had made, the gross income during the year, is that correct? A. Yes.

Q. And you reported on there the expenses that he told you, is that right? A. That's right.

Q. Did you know what business Joe Palermo was in? A. Yes; White Salmon——

(Testimony of Richard J. Bates.)

Q. No; what business was he in?

A. I always considered him a logger.

Q. Did his income tax return, did it show he was a logger and in the logging business?

A. Yes; it did, on the top of the page.

Q. No; I mean, did the schedules "C's" show that he had logging equipment?

A. Yes; I am sure that it did, that he had——

Q. He had depreciation? [104]

A. Yes; depreciation I was trying to say.

Q. He made some money other than logging, though?

A. The only other money that he made was out of his houses.

Q. And did you include that on his income tax?

A. Yes; I did.

Q. Mr. Bates, did you ever know how much money Mr. Palermo had in the bank, cash in the bank?

A. No.

Mr. Bantz: That is all.

Mr. Moore: Did you ever ask him how much money he had in the bank?

A. I never did.

Mr. Moore: That is all.

The Court: Any other questions of this witness?

Mr. Bantz: He may be excused for the time being. We are not going to excuse him——

The Court: You wish to have him around in the morning?

Mr. Bantz: Yes; I would like to have him around.

The Court: All right; you may make that arrangement with him.

Mr. Bantz: I would like to recall Matthew Bates for just a moment.

The Court: All right. [105]

MATTHEW BATES

recalled as a witness on behalf of the Government,
was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Mr. Bates, you are the same gentleman that was sworn and was on the stand previously?

A. Yes; that is correct.

Q. We have had some discussion about Joe Palermo and his income tax returns. Is the Joe Palermo concerned with your father and yourself in the courtroom?

A. He is.

Q. And would you point him out?

A. He is sitting at the table there.

Q. Behind counsel?

A. Yes; right.

The Court: Behind Mr. Moore?

Q. Behind Mr. Moore there?

A. Yes; right.

The Court: All right.

Mr. Bantz: That is all.

Mr. Moore: No questions.

The Court: All right; you may step down.

(Witness excused.) [106]

GUERTIN CARROLL

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please?

A. Guertin Carroll.

Q. And where do you reside, Mr. Carroll?

A. Seattle.

Q. And what is your business?

A. I am Seattle Branch Manager of the American Bonding Company of Baltimore.

Q. And how long have you had that position?

A. Nine years.

Q. Were you subpoenaed in this case?

A. I was.

Q. And you were asked to bring some records with you? A. That is correct.

Q. And did you bring them with you?

A. Yes; I did.

Q. What business is your company engaged in?

A. In the fidelity and surety business.

Q. Do you furnish bonds for loggers and what we call logger bonds?

A. That is correct. [107]

Q. Now, do you have some records there concerning Joe Palermo?

A. Yes; the two documents that under the subpoena I was to bring.

Q. These are two separate——

(Testimony of Guertin Carroll.)

A. That is correct, for two separate bonds, timber cutting contract bonds was all.

Q. Will you tell me the dates so I will have something on here to go by?

A. This bond was issued March 12, 1953, but it was cancelled flat, we might say, which means it is thrown out, which was the first bond we ever issued for him, and this bond was February 3rd, 1954.

The Clerk: Plaintiff's 31 and 32.

Q. Mr. Carroll, do you have an agent or someone you do business with at White Salmon, Washington?

A. Yes; we do.

Q. And who is that?

A. Keith McCoy, but I would like to explain that the Portland Branch handled them now because of their closer proximity, but I would like to explain that at the time of the issuance of the bond Keith McCoy was the local representative.

Q. Is that the McCoy Insurance Agency?

A. Yes. [108]

Q. Do you know Wally Legler?

A. Yes; I do.

Q. And who is he associated with?

A. He is associated with Keith McCoy.

Q. Did he handle policies for you?

A. He did at that time the same as Keith McCoy in the same office.

Q. Mr. Carroll, when your company makes a person a bond such as a timber bond like I have here or a Reforestry Bond, do they require a financial statement?

Testimony of Guertin Carroll.)

A. That is the practice, yes.

Q. From the individual obtaining the bond?

A. Correct.

Q. And, specifically, are the cash items verified?

A. On any new application where we don't know the background of the man our practice is to verify the bank account, perhaps some of the accounts receivable so as to be certain of the statements that are made and on which we are going to rely in the issuance of the bond.

Q. Now, handing you Plaintiff's 31 for Identification, examine that and just explain what that is?

A. That is an application for a \$1,600.00 bond to the State of Washington in connection with the reforestation on 200 acres. For some reason our file has been transferred to our Portland office. It might be that because Mr. [109] Palermo decided against it, but that bond wasn't required and it was returned to us and we closed the file and cancelled flat.

Q. There was no reason that he could not receive it?

A. No; that is correct, but it was returned by him.

Q. What is the date?

A. March 3, 1953, was the date we issued it.

Q. How did you receive that Plaintiff's 31?

A. It came through the mail from Keith McCoy.

Q. And he is one of your agents?

A. That is correct, at White Salmon.

Q. Now, handing you Plaintiff's 32 for Identification, would you examine that, please?

(Testimony of Guertin Carroll.)

A. That is an application for bond to the State of Washington, \$2,800.00, commonly called in our business a timber-cutting contract bond, issued by us February 1st, 1954, and containing financial statement.

Q. Where did you get that from?

A. That is from our Portland office at my request. They returned the application at my request. That came to us originally through the mail from Keith McCoy and had Joe Palermo's signature.

Q. In other words, both of these did come to you in the regular course of business to Seattle?

A. Yes; that is correct. [110]

Q. And they are regular applications concerning timber bonds? A. Yes.

Q. And I notice on each application there is a statement of assets and liabilities?

A. That's right.

Q. And you require that of certain individuals that request bonds from you?

A. Yes; that's right. On certain classes we waive it but not of the timber-cutting nature.

Q. On this Exhibit 31 for Identification in red chalk pencil there is some writing. Can you read what that is?

A. Yes; I both remember it and recognize it. That is my own red pencil that I used to keep on my desk. It says, "Verified by Agent," and I remember I had some information about it and when it came in I would write there as you see, "Verified by Agent," after the conversation on it.

(Testimony of Guertin Carroll.)

Q. And who did you have verify it?

A. I think it was Keith McCoy. It could have been Wally Legler.

Q. They work together?

A. That is right, in the same office. It could be either one.

Q. You asked, however, for somebody to verify the cash deposit there?

A. Yes; that is right. That was the first application received and I had no background on the man and I recall [111] clearly telephone Keith McCoy to find out whether that bank account could be verified, and he stated that it had already been verified.

Q. Have you ever furnished any logging bonds for Joe Palermo?

A. Yes; we have; four or five.

Q. What dates, generally, do you remember?

A. Why, that first one never—I have forgotten if one was 1953.

Q. That is Exhibit 31, 1953?

A. Yes; Exhibit 31, that was 1953, that is the one that I said was cancelled flat, meaning returned not wanted by Mr. Palermo. Well, then, I don't know that this in order of date——

Q. Well, let me ask you, during the dates from 1950 to February 3rd of 1954, which is Plaintiff's Identification 32, have you issued any bonds to Joe Palermo?

A. February, 1953? Let me just check these dates.

Q. February, 1954.

(Testimony of Guertin Carroll.)

A. 1954? Here was one, May 21st, 1954, timber-cutting bond in the State of Washington. June 21st, 1954.

Q. Now, during the year 1953—— A. Yes.

Q. ——I take it then you had the applications that you have here that have been subsequent to the date of February, [112] 1954?

A. That is correct.

Mr. Bantz: I am not going to offer them now. You may examine.

Cross-Examination

By Mr. Moore:

Q. In the normal course of events, Mr. Carroll, on a matter such as this timber bond, is the determination of the issuance of the bond in your office?

A. Myself, personally.

Q. Yourself, personally?

A. Yes; correct.

Q. And you rely solely on the application?

A. Plus our investigation. These were not large bonds or we would have made a more thorough investigation, but here were small amounts involved and verification of the bank account was made and I had no hesitancy.

Q. I assume that your agent also advised you whether or not he recommended the bond when he sent the application in?

A. I think that can be presumed. I couldn't recall the detail but I think he would not have offered

Testimony of Guertin Carroll.)

t if he didn't think it was acceptable, that is right.

Q. Is there any difficulty normally in obtaining those bonds as opposed to other types of bonds?

A. Well, not especially if there is background or experience [113] and some financial responsibility. Someone that started their business with very little capital would have difficulty. As I said before, these are all small, and if we would issue a larger one we would want to go into it more thoroughly.

Q. In other words, a man seeking a timber bond more or less has to prove himself to you before you issue the bond?

A. Yes; if he wasn't more or less acceptable from the moral viewpoint as well as from the financial we would have a considerable time handling it.

Mr. Moore: That is all.

Mr. Bantz: That is all.

(Witness excused.)

WALLACE LEGLER

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. Wallace Legler.

Q. Where do you work, Mr. Legler?

A. Keith McCoy insurance office at White Salmon.

(Testimony of Wallace Legler.)

Q. And where do you reside?

A. At White Salmon. [114]

Q. And how long have you worked for Keith McCoy?
A. Ten years.

Q. And what is your job with Keith McCoy Insurance Agency?

A. Oh, General Office Manager and solicitor.

Q. What type of agency is the Keith McCoy Agency?
A. All lines of insurance.

Q. Does that include bonds?
A. Yes.

Q. That is considered an insurance?

A. Yes.

Q. Do you know Joe Palermo?
A. I do.

Q. Is he here in the court room?

A. Yes; he is.

Q. How long have you known him?

A. I would judge at least eight years.

Q. Handing you Plaintiff's Exhibit 31 for Identification, Mr. Legler, would you please examine that? Have you seen that before?

A. Yes; I have.

Q. And where did you see it?

A. At the office.

Q. And who was present at the time?

A. Joe Palermo and myself.

Q. All right. And is that considered an application? [115]
A. Yes, it is.

Q. And just tell me, was that application filled out in your presence?
A. Yes; it was.

Q. Did you fill it out?
A. Yes; I did.

Q. And I notice there are numerous figures and

(Testimony of Wallace Legler.)

Writing on there; who told you what to put in there?

A. Joe Palermo came and gave me the information.

Q. And you put it onto the sheet?

A. Yes; I did.

Q. Now, what was the date that this bond application is considered to be effective, or did you make it?

A. Assuming that the bond was accepted by the insurance company, I wish to have them make it effective as soon as upon receipt of the application and approval by them.

Q. Do you recognize the signature on the back and there? A. Yes; I do.

Q. And was that signed in your presence?

A. Yes; right.

Q. And that is the signature of Joe Palermo?

A. Yes; it is.

Q. And there is a financial statement of assets and liabilities? A. There is. [116]

Mr. Bantz: Your Honor, I will offer Plaintiff's 31 into evidence.

Mr. Moore: May I inquire?

The Court: Yes; all right.

Q. (By Mr. Moore): Now, is Plaintiff's 31 the only copy that was made of this application?

A. No.

Q. There was another copy made? A. Yes.

Q. And that was what; retained in your office?

A. It is.

(Testimony of Wallace Legler.)

Q. I notice that the date is blank, and there is no witness on this. Would this copy be the one that would be executed without the witness' signature and a date on it?

A. No; I don't believe so. That particular file I—I drew up a work sheet on it, and that is what we have in the office.

Q. The only date that I can see on here, Mr. Legler, is what appears to be 3/12/53. Is that your writing? A. No.

Q. So the exact date when this may have been taken, you don't recall, is that correct; I mean, do you recall? A. Yes; I do.

Q. Was it in March of 1953? [117]

A. Yes; it was March 7th.

Q. March 7th of 1953? A. Yes.

Mr. Moore: All right; I have no objection.

Mr. Bantz: May it be admitted, your Honor?

The Court: Yes. That is 31?

Mr. Bantz: Yes, your Honor.

The Court: All right; it may be admitted.

(Whereupon, said bond application was admitted in evidence as Plaintiff's Exhibit No. 31.)

Q. (By Mr. Bantz): Now, Mr. Legler, showing you Plaintiff's Exhibit 31, there is a notation on it that says under "Current Assets," "Cash in White Salmon Branch National Bank of Commerce \$50,000.00," and in red pencil it says "Verified by Agent." Are you the agent that verified that?

(Testimony of Wallace Legler.)

A. I am.

Q. How did you verify the \$50,000.00 cash?

A. I went over to the bank and asked the manager, Mr. Babb, if he had that much money in the bank and Mr. Babb said that he had in excess of \$50,000.00.

Q. All right. Now, referring again, below there is—this writing I take it is yours, did you [118] testify? A. Yes.

Q. Now, there are items in here like rentals and 1,500 acres of timber and the vacant lots in White Salmon and so forth? A. Yes.

Q. Where did you get that information from; in your office from what source?

A. Well, I got it from Mr. Palermo while he was in the office.

Q. And then you transposed it right onto here?

A. Yes.

Q. Now, handing you Plaintiff's 32 for Identification, will you examine that exhibit, please? What is the date now of that exhibit?

A. February 3rd, 1954.

Q. And do you recognize that exhibit?

A. Yes; I do.

Q. And where was that exhibit made up?

A. In our office at White Salmon.

Q. And was that made up by you or by someone else in the office?

A. It was made up by Keith McCoy.

Q. Do you recognize his writing?

A. It is printed.

(Testimony of Wallace Legler.)

Q. Or his printing? [119] A. Yes.

Q. All right. And do you recognize the signature on the back? A. Yes, I do on the back.

Q. And do you recognize the signature of Joe Palermo? A. Yes.

Q. And Plaintiff's 32 is the same type of bond application as Plaintiff's Exhibit 31, the one you just had previously? A. Yes, it is.

Mr. Bantz: You may examine.

The Court: Any other questions of this witness?

Mr. Moore: Yes, I have one question, Your Honor.

Cross-Examination

By Mr. Moore:

Q. In making up Exhibit 31, the information that you got from Mr. Palermo on property values, did you ask him to give you the property values at cost or at market value?

A. Conservative market value.

Q. At a conservative market value?

A. Yes.

Q. And at that time there was no check made of Mr. Palermo's books to ascertain whether his indebtedness was more or less; you merely asked him what he owed in general?

A. Yes, I [120] did.

Q. It more or less limited it to large sums that he might owe; in other words, you weren't interested in small bills or current bills?

A. Do you mean monthly living?

(Testimony of Wallace Legler.)

Q. Yes. A. Yes, to some extent.

Q. You did go into that to some extent?

A. Well, as a general practice I usually ask people what their average monthly expenses are and then we use that as current items.

Mr. Moore: Yes. I think that is all.

Redirect Examination

By Mr. Bantz:

Q. Mr. Legler, except for the item of \$50,000.00 cash that you verified did you rely then on the statements given you by Mr. Palermo?

A. Yes, we did.

Q. And that is customary? A. Yes.

Mr. Bantz: I have no further questions.

Recross-Examination

By Mr. Moore:

Q. Did you recommend the issuance of that bond by your company?

A. I don't recall definitely saying it but I do know that as [121] a matter of practice when we know an individual and by reputation he is a good reasonable responsible individual and he is a good logger, that I did do so. And the particular type of policy or bond it has been our experience that the bonding company is not interested in issuing them to, you might say, the "fly-by-nighters," and so the company has recommended the issuance of bonds that we have submitted.

(Testimony of Wallace Legler.)

Q. As far as this particular one is concerned you didn't recommend that it not be issued on the basis of information that you had on the financial statement as well as the information you had from Mr. Palermo, did you make use of that?

A. Yes, that's right.

Q. And what was that?

A. We did recommend the issuance of the bond.

Q. And on that recommendation based upon your knowledge of Mr. Palermo, it was your knowledge of Mr. Palermo in addition to the financial statement that caused you to issue this bond or recommend its issuance?

Mr. Bantz: Your Honor, I am going to object to putting him on as a character witness at this time. They can put him on as a character witness at the proper time.

The Court: That is right, you can make him your witness as to character, if you wish. [122]

Mr. Moore: I did not intend to make him a character witness.

The Court: I think he may state that they relied upon his knowledge of this defendant's reputation and so on, but I don't think he should state what it was. It wouldn't be the best evidence.

Mr. Moore: I see. That is all.

Mr. Bantz: That is all.

(Witness excused.)

The Court: It is time to suspend. The court will now adjourn, ladies and gentlemen until tomorrow

morning at ten o'clock, and remember what I said about not discussing the case among yourselves or with anybody else.

July 24, 1957, 10:00 A.M.

The Court: Proceed.

Mr. Bantz: Mr. Taylor, would you mark that as Exhibit 19-B, please.

The Clerk: How about 19-A.

Mr. Bantz: Or "A," pardon me.

The Clerk: This is an additional deposit slip, Your Honor, 19-A; and I have also marked before court convened, Plaintiff's 33 and 34. [124]

The Court: You have already marked them?

The Clerk: Yes, your Honor.

Mr. Moore: No objection to 19-A.

The Court: All right.

Mr. Bantz: I will offer it in evidence.

The Court: That is 19-A?

Mr. Bantz: Yes, 19-A. Your Honor, that is the deposit slip for \$6,468.00 in the National Bank of Commerce that I was talking to Mr. Babb about yesterday. It was one that he had not found when he delivered the records up here.

The Court: Yes. There is no objection?

Mr. Moore: No objection.

The Court: It will be admitted.

(Whereupon, said deposit slip was admitted in evidence as Plaintiff's Exhibit No. 19-A.)

Mr. Bantz: Would you call Mr. Zunke.

WILLIAM ZUNKE

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please?

A. William Zunke. [125]

The Court: Will you speak up, please, Mr. Zunke, it is hard to hear in this room.

A. William Zunke.

The Court: All right.

Q. And where do you live, Mr. Zunke?

A. White Salmon.

Q. And how long have you been a resident of White Salmon?

A. Oh, I have been there this last time since '54.

Q. Since 1954. You lived there previously, did you?

A. Yes, sir.

Q. And what is your relationship between Mr. Palermo and yourself?

A. He is my son-in-law. I am his father-in-law.

Q. You are his father-in-law?

A. Yes.

Q. In other words, your daughter is his wife?

A. That's right.

Q. Has Mr. Palermo in the past worked for you?

A. Not lately.

Q. No, I mean a long time ago?

A. Yes, he has.

Q. When was that?

A. The first time he went to work for me in '32. He worked for about six months and then he had

(Testimony of William Zunke.)

to leave in '32. Then, he went to work for me in '34 and he worked for me [126] until November '47.

Q. All right, now, in November of '47, where was he employed by you?

A. At White Salmon, Washington.

Q. In what business were you engaged?

A. Logging.

Q. In what business have you employed him?

A. Logging.

Q. In other words, your business is logging?

A. Yes, sir.

Q. Are you still engaged in the logging business?

A. Yes, sir.

Q. Mr. Zunke, did you assist your son-in-law in getting started in the logging business?

A. Well, I don't know how to answer that. I sold him some equipment.

Q. Did you sell some equipment on time?

A. Yes, I did.

Q. So he could get started?

A. I sold him some equipment on time.

Q. And he paid you for that, is that right?

A. Yes.

Q. I mean it was a regular business transaction between you and your son-in-law?

A. Yes, sir. [127]

Q. Now, when was it that he started in business after that as far as you were concerned?

A. Well, I sold him. I sold him the equipment in November, '47.

Q. Tell me what did you sell him?

(Testimony of William Zunke.)

A. Chevrolet logging truck and trailer and logging jammer.

Q. Chevrolet truck? A. And trailer.

Q. And trailer? A. Yes.

Q. And jammer? A. Yes.

Q. Now, a jammer is a log loader?

A. Yes, machine that you load logs with.

Q. Now, I take it that the Chev truck was a logging truck? . Yes, that's right.

Q. Did you sell those to him on contract or mortgage or how was that?

A. I sold it to him on a verbal agreement.

Q. On just an oral agreement?

A. Just a verbal agreement. There was no contract between us that I can remember.

Q. Then did he pay you then for the machines?

A. He did.

Q. Do you know how much he paid you? [128]

A. I can't remember the exact amount that he paid me because he took over the payments. That wasn't all clear when I sold it to him and he took over the payments and finished paying the payments on that truck in 1948. I can't remember how much he gave me on that truck.

Q. But he took over your equity?

A. Yes.

Q. And when did he complete the payment?

A. I think sometime in '48.

Q. Now, did you furnish him any stumpage?

A. There was a little. I can't quite remember.

(Testimony of William Zunke.)

I think there was a little timber. There was something else too. He got some logs that were ready cut which he paid me back the cutting. I had paid the cutters for cutting these logs. There wasn't any timber.

Q. And he paid you back for what you had already paid out?

A. That's right. That's right.

Q. And do you know how much in logs that was?

A. No, I don't.

Q. What is stumpage; what does the terminology "stumpage" mean?

A. At that time?

Q. Yes, what is "stumpage"?

A. Well, it is timber you buy standing. It is stumpage.

Q. All right, I just want the jury to understand, Mr. Zunke, [129] what you and I are talking about here?

A. Yes, surely.

Q. Do you have any idea how much stumpage you sold or was included in your original deal with Mr. Palermo?

A. I do not, no.

Q. Were you to receive some money back from the stumpage that you sold him?

A. I think I did.

Q. How much would that be, do you know?

A. I don't remember. I don't know.

Q. Mr. Zunke, handing you Plaintiff's Exhibit 12, which is a bank deposit slip from Mr. Palermo to the bank at Stevenson, dated 6/28/50, there is a notation here, "W. A. Zunke 753.46."

(Testimony of William Zunke.)

A. Pardon me, I thought you were talking when I first——

The Court: Speak up, please.

Mr. Bantz: You have got to speak up. I know we are off of that subject.

The Court: We have got to hear you.

Mr. Bantz: I am not interested in what you were whispering about.

The Witness: I am not whispering.

Q. (By Mr. Bantz): That is right, Mr. Zunke, \$753.46? A. Yes, that's right.

Q. Now, you are W. A. Zunke? [130]

A. Yes, I am.

Q. Now, you paid your son a check in that amount, do you remember?

The Court: Son-in-law.

Mr. Bantz: Yes, pardon me, son-in-law.

A. I paid for some logs I got in 1950 but the exact amount of the checks I can't tell you.

Q. Now, referring to Plaintiff's Exhibit 16, which is bank deposit slips with the Security State Bank in the name of Joe Palermo, there is a notation, a number "98-187, W. A. Zunke, 789.37." It is dated September 27, 1950. Now, just one more; and reading from Palermo deposit slip, Exhibit 16, on the deposit slip of 11/16/50, is another notation of a check deposited in your son-in-law's account in the amount of \$1,677.32 with a notation of "W. A. Zunke," That makes three checks in 1950 with your notation on, with your name on there, Mr. Zunke.

(Testimony of William Zunke.)

Do you recall of paying your son-in-law the money in 1950?

A. Yes, sir. I paid him the money.

Q. You don't recall the exact amount?

A. No.

Q. What was the money for?

A. For cut logs in the woods.

Q. For cut logs in the woods? [131]

A. Yes.

Q. Now, did you receive any other money in the years of '50, '51, '52, or '53 from your son-in-law for logs? A. No.

Q. Did you pay him something—I don't mean receive it, pardon me. Did you pay him any?

A. I don't recall paying, no I don't recall any.

Q. You have had some other business transactions with Mr. Palermo? A. Yes, sir.

Q. What kind of business transactions were those?

A. He loaned me some money on two occasions.

Q. When was the first?

A. I don't recall exactly when it was. But he—I think it was in '51 or '52 he loaned me \$2,000.00.

Q. All right, how did he loan you that; in check or cash? A. In check.

Q. Did you repay him the \$2,000.00.

A. Yes, I did.

Q. And how did you repay that to him?

A. I paid him \$500.00 at a time, plus some interest on the first two or three checks.

(Testimony of William Zunke.)

Q. And that \$2,000.00 was paid in full?

A. Yes, sir.

Q. Now, he loaned you some money the second time? [132]

A. Yes, sir.

Q. Now, can you just recall when that was?

A. He loaned me \$3,000.00 I believe it was in '53, spring of '53.

Q. How did you receive the money; in what form did you receive the money?

A. I received it in a check.

Q. Did you repay Mr. Palermo the money?

A. Yes, I did.

Q. Where were those two loans made?

A. Well, I live at Carnation, Washington, and he lived at White Salmon, Washington, and he mailed me the money.

Q. He mailed you the money? A. Yes.

Q. Did he have a promissory note each time or was it an oral agreement?

A. I had a promissory note I gave on the first one and the second one nothing that I know of.

Q. And do you owe Mr. Palermo any money at the present time? A. Yes, I do.

Q. Is any of that money from a loan made during the years 1950 through 1953? A. No, sir.

Q. Have you made any additional loans during 1954 and 1955? A. No, sir. [133]

Q. I mean did you borrow any?

A. No, sir.

Q. Well, Mr. Zunke, I believe you stated that Mr. Palermo worked for you during the years of

Testimony of William Zunke.)

1946 and part of 1947? A. Yes, sir.

Q. Do you recall what his income was or what you paid him as a result of that employment in 1947 and 1946?

A. It run between \$4,500.00 and \$5,500.00 somewhere right in there.

Q. Now, did he work for anybody else during those years? A. Not that I know of.

Q. You would have known of it if he was working for someone else in the logging business, wouldn't you? A. Oh, yes.

Q. Now, during the years preceding that time that he worked for you—I don't mean to the exact dollar—let us take the years of '44, '45 and '46, do you have any idea what his average income was?

A. Well, they were pretty near the same, pretty near the same. They weren't quite as much up in '44 but in '45 as the market picked up he made more money.

Q. Well, in '44 he didn't make much money?

A. Well, he made quite a bit in '44 and '45.

Q. How much was that?

A. I can't tell you exactly but it run pretty close to the [134] '46 months.

Q. In other words, \$4,500.00 or \$5,000.00?

A. Yes, sir, that is right.

Q. That would be his average then for those four years? A. You are right.

Q. Now, in the past ten years have you made any substantial gifts to your daughter Mrs. Palermo?

A. No.

(Testimony of William Zunke.)

Q. Have you made any monetary—given any gifts of money at all to her? A. No.

Q. Or any other property? A. No.

Q. Have you made any gifts to Mr. Palermo in the past ten years? A. No.

Mr. Bantz: You may examine, Mr. Moore.

Cross-Examination

By Mr. Moore:

Q. Mr. Zunke, you said that Mr. Palermo worked for you in 1932?

A. Yeah, about six months or so he worked for me.

Q. Is that when you first became acquainted with him?

A. I became acquainted with him in 1930.

Q. Where was that? [135]

A. In Olympia, Washington.

Q. In 1932 where did he work for you?

A. He worked for me in Okanagon County, Tanassee.

Q. What kind of work was he doing?

A. He cut logs for me in 1932.

Q. And in 1944 and 1947 when he was working for you, where did he do this work?

A. Well, he worked different places, in different counties. He worked in Snohomish County most of the time.

Q. Snohomish County?

A. Yes, at Port Angeles, Washington.

Q. And where else?

(Testimony of William Zunke.)

A. And in Klickitat County.

Mr. Bantz: I can't hear you.

A. In Klickitat County.

Mr. Moore: Will you speak up.

Q. During the years 1944 to 1947, what kind of work was he doing?

A. He drove truck for me.

Q. That was the only kind of work he did?

A. Well, he loaded logs and worked with the logs and anything else, and if I needed any help he gave me a hand. That was the main job driving truck.

Q. In the first part of that period, 1934, 1944 and 1945, approximately what would Mr. Palermo's income have been [136] for a year?

A. I didn't get that.

Q. How much did Joe make driving truck for you during that period?

A. Well, at first we didn't make very much money during those hard times, some years we didn't make very much. I remember one year we didn't hardly make any money. We didn't make any money in 1930—in 1930, but in—not in 1930 but in 1934 at Port Angeles.

Q. You paid your men off with credit slips?

A. Well, we gave them credit slips to go and get groceries.

Q. About when did Joe start making \$4,500.00, when would that have started in about?

A. Well, '44.

(Testimony of William Zunke.)

Q. Well, in other words, from about 1932 to 1944 he didn't make too much money?

A. No, he didn't.

Q. During the period of '44 to '47, did Mr. Palermo have anything to do with the actual operation of the business other than driving truck?

A. No, sir.

Q. Did he have anything to do with the payroll?

A. No, sir.

Q. Or bookkeeping? A. No, sir. [137]

Q. And in '47 when you sold this equipment to Mr. Palermo was it your idea that you were getting out of the logging business at that time?

A. Yes, sir.

Q. Did Mr. Palermo approach you about going into business by himself?

A. I can't remember just how that came about but I got hurt in '46. I got my arm hurt and I couldn't work in '47. Mr. Palermo was working and it was pretty hard for me to work and I wanted to get out, and how it was and the conversation I can't remember.

Mr. Moore: That is all.

Mr. Bantz: You may be excused.

The Court: That is all, Mr. Zunke.

(Witness excused.)

DORIS MORIARTY

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please?

A. Doris Moriarty.

Q. And Mrs. Moriarty, where do you live?

A. White Salmon.

Q. And how long have you lived at White [138]
Salmon? A. Since '48.

Q. And where are you employed at the present
time?

A. For the Loggers Association at Bingen,
Washington.

Q. For the Loggers Association? A. Yes.

Q. What is the name of that Loggers Associa-
tion? A. Mt. Adams Loggers Association.

Q. What is your position with the Mt. Adams
Loggers Association?

A. I am their bookkeeper.

Q. And are you the office manager?

A. Yes.

Q. Are you the only full-time employee of the
Association?

A. In the office, yes. We have one more worker.

Q. What does your job consist of in that Asso-
ciation?

A. Taking care of the books, contacting buyers
and contacting loggers to dump logs into the river
for use.

(Testimony of Doris Moriarty.)

Q. What is the function of the Mt. Adams Loggers Association?

A. Well, it is a group of sixty-three members who are all loggers and they formed a corporation so that they would have a market for their logs if they wished to sell down river.

Q. Now, do you purchase the logs, then, your Association, or do you just handle them?

A. No, we just handle them for the loggers. [139]

Q. When did you go to work for the Mt. Adams Association? A. November, 1953.

Q. And you have been the bookkeeper ever since then? A. Yes.

Q. How does the Mt. Adams Association get any money as a result of the work you do, do you get paid anything? A. Do I get paid anything?

Q. No, does the Association get paid for the work you do?

A. The Association gets paid for booming and rafting the logs.

Q. How much is that?

A. They collect \$1.75 for all logs that are rafted at the boom.

Q. Is Mr. Palermo a member of the Mt. Adams Loggers Association? A. Yes, sir.

Q. Do you know Mr. Palermo?

A. Yes, sir.

Q. Is he in the court room? A. Yes, sir.

Q. Where is he sitting?

A. Behind Mr. Moore.

(Testimony of Doris Moriarty.)

Q. Thank you. Has Mr. Palermo been an officer of the Mt. Adams Loggers Association?

A. No, sir. [140]

Q. Have you had any business with Mr. Palermo in connection with the Mt. Adams Loggers Association?

A. He dumped logs in the dump and we have paid him for the logs.

Q. You have paid him for the logs that he has dumped there? A. Yes.

Q. How is that money paid, Mrs. Moriarty, in what form? A. Check.

Q. Who signs your checks?

A. I do and one of the officers.

Q. Now, do you know when the Mt. Adams Loggers Association was formed?

A. In 1950 and then they reorganized again in 1954.

Q. I believe you were given a subpoena duces tecum to bring some records with you, is that correct? A. Yes.

Q. And did you bring those? A. Yes.

Q. You brought those records with you?

A. Yes.

The Clerk: Plaintiff's 35 and 36.

Mr. Bantz: Could we have you just clip those in the end just inside for the time being until we examine them, Mr. Taylor.

The Clerk: Yes. 37 and Plaintiff's 38. [141]

Q. (By Mr. Bantz): The records you just

(Testimony of Doris Moriarty.)

handed to me, Mrs. Moriarty, are they in your custody? A. Yes.

Q. And you keep the custody of these records as well as others of the Association, do you?

A. Yes.

Q. Now, handing you Plaintiff's 35 for Identification, please examine that. Is that part of the records you brought with you? A. Yes, sir.

Q. And do you recognize it? A. Yes, sir.

Q. Now, what are those?

A. Those are checks in payment of the logs at the dump.

Q. And who are they to?

A. Joe Palermo.

Q. Now, I notice that the signature on here is not your signature, is that correct?

A. Yes, sir.

Q. Do you know whose signature it is?

A. Yes, sir.

Q. And whose? A. Mr. Twidwell.

Q. Mr. Twidwell?

A. Yes, he was President of the Association at that time and [142] Atha Twidwell was the book-keeper.

Q. These are part of the records of the Loggers Association? A. Yes.

Q. And who are those checks made payable to?

A. Joe Palermo.

Q. I notice now in your Plaintiff's 35 they are for the year 1950? A. Yes, sir.

Q. Will you just go through the business of

(Testimony of Doris Moriarty.)

examining each check and be sure who they are to and if you recognize the signature?

A. Yes, they are all to Joe Palermo and I recognize all the signatures.

Q. And what would these checks be for?

A. Payment of logs.

Mr. Bantz: I will offer Plaintiff's 35 in evidence.

Mr. Moore: No objection.

The Court: It will be admitted.

(Whereupon, said group of checks was admitted in evidence as Plaintiff's Exhibit No. 35.)

Q. Mrs. Moriarty, I will just read from Plaintiff's Exhibit 35 the check amounts. There is date of October 18, 1950, and the amount of \$218.00. Then there is \$186.39 on a [143] check dated October 24, 1950, and then one in the amount of \$884.00, dated November 14th, 1950. A. Yes.

Q. And then one in the amount of \$194.60, dated November 20, 1950, and one in the amount of \$416.44, dated December 5th, 1950, and one dated December 26, 1950, in the amount of \$428.56.

A. That is correct.

Q. Now, do you have any other checks for the year 1950 in the Mt. Adams Loggers Association that were made to Joe Palermo? A. No.

Q. Did you check your records? A. Yes.

Q. Now, handing you Plaintiff's 36 for Identification. Please examine that. Is that one group of checks that you brought with you?

(Testimony of Doris Moriarty.)

A. Yes. Yes.

Q. And they are for what year? A. '51.

Q. And they are payable to whom?

A. Joe Palermo.

Q. Now, please check each signature so that you can testify as to the signature on each check.

A. Yes, they were all issued by the Loggers Association. [144]

Q. And they are all signed by the same people?

A. Yes, the Twidwells.

Q. The Twidwells? A. Yes.

Q. And these are from your official records?

A. Yes.

Q. And did you check to see if there were any other checks for the year 1951? A. Yes.

Q. Did you find any others? A. No.

Q. And what would these checks be for?

A. Payment of logs.

Q. Payment of logs handled through your Loggers Association? A. Yes.

Mr. Bantz: I will offer Plaintiff's 36.

Mr. Moore: No objection.

The Court: It will be admitted.

(Whereupon, said group of checks was admitted in evidence as Plaintiff's Exhibit No. 36.)

Mr. Bantz: Your Honor, if I may I just want to run through these to the jury on the dates and amounts.

The Court: That is all right. [145]

Testimony of Doris Moriarty.)

Mr. Bantz: I will save a little bit of time here.

The Court: All right.

Mr. Bantz: Check in the amount of \$224.22; May 16, 1951, in the amount of \$542.75; May 29, 1951, \$789.74; June 5th, 1951, a check in the amount of \$470.42; June 12th, 1951, a check in the amount of \$888.58; June 19, 1951, a check in the amount of \$172.24; June 26, 1951, a check in the amount of \$263.21; July 12, 1951, a check in the amount of \$460.06; July 19, 1951, check in the amount of \$350.84; July 7, 1951, check in the amount of \$1,006.42; July 23, 1951, check in the amount of \$313.16, and September, 1951, a check in the amount of \$127.09.

Q. Handing you Plaintiff's Exhibit 37 for identification, Mrs. Moriarty, would you please examine each check again in that exhibit?

A. Yes, those are all checks from the Association.

Q. And they are all signed by the same people?

A. No. They are signed by Clyde Winfee, he was the President of the Association that year.

Q. What year were those checks?

A. 1952.

Q. Did you look in your records to see if there were any additional checks? A. Yes.

Q. Did you find any? [146] A. No.

Q. What were these checks for?

A. Payment of logs.

Q. Through your association? A. Yes.

(Testimony of Doris Moriarty.)

Mr. Bantz: I will offer Plaintiff's 37, your Honor.

Mr. Moore: No objection.

The Court: Admitted.

(Whereupon, group of checks of year 1952 admitted in evidence as Plaintiff's Exhibit No. 37.)

Mr. Bantz: Your Honor, again, if I may read them.

The Court: Yes, you may read the amounts.

Mr. Bantz: Rather than ask her, if I may read them. I am just going to read the amounts. They start with April 22, 1952, and end November 12, 1952, and I will just read the amounts. \$284.78, \$441.97, \$613.17, \$267.48, \$148.74, \$160.89, \$91.07, \$120.00, \$160.31, \$233.16, \$328.72, \$576.27, \$125.15, and \$135.24.

Q. Now, Mrs. Moriarty, handing you Plaintiff's Exhibit 38, for Identification, would you please examine that exhibit. First what is that exhibit?

A. They are checks in payment of logs.

Q. And who are they to? [147]

A. Joe Palermo.

Q. Would you please examine each of those checks and be sure you recognize them?

A. This is a list of them here.

Q. You have got to speak up.

A. This is a list of them here and these are to two people here, Joe Palermo and James Willman.

Q. Now, in Plaintiff's 38 you are stating that

(Testimony of Doris Moriarty.)

There are six checks that are made jointly to James Willman and Joe Palermo? A. Yes, sir.

Q. What were those six checks for here?

A. Well, it was my understanding——

Q. Well, do you know what they were for? I don't want your understanding.

A. They were in payment of logs.

Q. They were in payment of logs?

A. Yes.

Q. Why was there two names on the checks?

A. Mr. Willman was using a piece of the equipment of Mr. Palermo and he wanted to get paid for the use of the equipment and so Mr. Willman put the logs in their joint names.

Q. Who was using whose piece of equipment?

A. Mr. Willman was using Mr. Palermo's piece of equipment. [148] They were Mr. Willman's logs.

Q. And the checks were made jointly to the two individuals? A. Yes, sir.

Q. All of the checks in Plaintiff's 38 for Identification were for Mr. Palermo? A. Yes.

Q. And these are the records you brought up here? A. Yes.

Q. And these are for the year 1953?

A. Yes.

Q. And did you find any other checks made payable to Mr. Palermo? A. No, sir.

Mr. Bantz: I will offer in evidence Plaintiff's 38.

Mr. Moore: No objection.

The Court: It will be admitted.

(Testimony of Doris Moriarty.)

(Whereupon, said checks of the year 1953 admitted in evidence as Plaintiff's Exhibit No. 38.)

Mr. Bantz: Your Honor, I would like to read, again, the amount of these checks, if I may. Starting with the check dated June 22nd, 1953, through December 28, 1953, from Plaintiff's Exhibit 38, checks in the following amounts: \$273.51, \$1,241.60, \$957.76, \$1,428.37, \$1,620.24, \$906.86, [149] \$1,239.76, \$1,058.12, \$132.46, \$136.53, \$121.84, \$409.88, \$1,087.43, \$100.78. A check to Joe Palermo and James Willman \$98.61. Another one to the same individuals, \$693.35. To Palermo, \$788.70, \$1,167.88, \$447.66, \$167.76. Another one to Willman and Palermo \$801.60, and to Palermo, \$243.80. To Willman and Palermo, \$177.71, \$1,611.13, \$91.60, \$790.32, \$113.30, made to Willman and Palermo, \$262.87, \$326.75 and \$526.57 and \$1,237.06.

Q. Mrs. Moriarty, was Mr. Palermo a member of your organization during the years of 1950, 1951, 1952 and 1953?

A. I believe Joe became a member in 1952.

Q. And your records show that, do they?

A. In other words, he was not a member in 1950 and 1951? A. No.

Mr. Bantz: You may examine, Mr. Moore.

(Testimony of Doris Moriarty.)

Cross-Examination

By Mr. Moore:

Q. Can any logger run logs through the association without being a member?

A. At the present time they can.

Q. In 1950 and 1951 could they?

A. Yes, they could but there was an extra fee.

Q. The money then that was given to Mr. Palermo in '50 and '51 would have been after the logs which belonged to him had been sold and the cost of booming and rafting, [150] the normal and extra fee had been taken out? A. Yes.

Q. And 1952 and 1953 it would have been the same thing except without that extra fee?

A. Yes, sir.

Q. How are the checks from the Association normally delivered to the loggers; by mail?

A. By mail unless they come by the office and pick them up.

Mr. Moore: I think that is all.

The Court: Any other questions?

Redirect Examination

By Mr. Bantz:

Q. Did Mr. Palermo ever come by and pick up any of his checks, to your knowledge?

A. I usually mailed Mr. Palermo's.

Q. You usually mailed them to him?

A. Yes, sir.

(Testimony of Doris Moriarty.)

Q. Now, you state that all of the expenses incurred through the association are deducted prior to the time you send the checks to him?

A. Yes.

Mr. Bantz: Your Honor, I stop there with her. I want to change to another job that she had at a previous time. It was a different job.

The Court: All right. [151]

Q. Mrs. Moriarty, where were you employed in 1951 up until the time you went to work for the Mt. Adams Association?

A. The first part of 1951 I worked at the bank but in March, 1951, I worked for McCormick Lumber Company.

Q. And how long did you work for McCormick Lumber Company?

A. Until November 1st, 1953.

Q. What was your position with McCormick Lumber Company?

A. I was the bookkeeper.

Q. And where was McCormick Lumber Company located?

A. Bingen, Washington.

Q. And was it also a general lumber operation?

A. Yes.

Q. Is it still in business. A. No.

Q. When did the McCormick Lumber Company go out of business?

A. The corporation that I worked for stopped operation November 1st, 1953.

Q. Did you keep the books and records during

(Testimony of Doris Moriarty.)

he time that you were there? A. Yes, sir.

Mr. Bantz: Will you be so good as to clip them
n there; I want those two checks placed together
for identification, Mr. Taylor.

The Clerk: As one?

Mr. Bantz: Yes, as one. [152]

The Clerk: Plaintiff's 39 and Plaintiff's 40.

Q. Mrs. Moriarty, do you at this time know
where the records of McCormick Lumber Company
are? A. No, sir.

Q. Handing you Plaintiff's Exhibit 39 for
Identification, would you just look at that and see
if you recognize what it is?

A. It is one of the checks that was issued by
McCormick Lumber Company to Joe Palermo for
\$1,000.00.

Q. And what was the date?

A. December 21st, 1953.

Q. There is another check on there; would you
tell the Court what that is?

A. December 5, 1953, for \$1,000.00 made payable
to Joe Palermo and Mr. McCormick signed it.

Q. And do you recognize the signature on that
check? A. Yes.

Q. And is the exhibit and the type of check used
by McCormick Lumber Company? A. Yes.

Q. Now, would you examine Plaintiff's 40 for
Identification. Do you recognize what that is?

A. Yes.

Q. Would you state what it is?

A. It is the ledger sheets out of our accounts

(Testimony of Doris Moriarty.)

payable [153] ledger for logs of McCormick Lumber Company.

Q. Well, it isn't the original?

A. No, it is a photostatic copy.

Q. It is a photostatic copy? A. Yes.

Q. Now, do you find your writing anywhere on there? A. Yes.

Q. Where does your writing start?

A. March 27th, 1953.

Q. All right, then, is the balance of the exhibit in your handwriting? A. Yes.

Q. And would you state again what this is now, the whole thing, what do you call it?

A. It is the ledger sheets from the accounts payable ledger for logs.

Q. And who is it to?

A. To Joe Palermo.

Q. And what is the accounts payable; what do you mean by the accounts payable?

A. If McCormick buys logs from Joe Palermo or other loggers and they set up a ledger to show record of all loggers' logs received and date of payment.

Q. And this would show what had been paid to Joe Palermo during the dates represented on there, is that right? [154] A. Yes, sir.

Q. Who was President of McCormick Lumber Company. A. Mr. McCormick.

Q. Do you know where Mr. McCormick is now?

A. No, sir.

Mr. Moore: I have no objection to 29.

Testimony of Doris Moriarty.)

Mr. Bantz: 39.

The Court: It is 39.

Mr. Moore: I mean 39.

Mr. Bantz: We offer it in evidence.

The Court: It will be admitted.

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 39.)

Mr. Moore: No objection to 40.

The Court: Forty will be admitted.

(Whereupon, said ledger sheets were admitted in evidence as Plaintiff's Exhibit No. 40.)

Q. Mrs. Moriarty, I am not sure I asked you: For the accounts payable what were these payable to Mr. Palermo for; what was the money payable to him for? A. For logs. [155]

Q. For logs? A. Yes.

Q. Now, would you examine Plaintiff's Exhibit 40 and tell me if Mr. Palermo had any money coming at the end of the time that the books show on there?

A. As of September 18th, 1953, he had a balance due him of \$6,275.74.

Q. Now, in Plaintiff's Exhibit 39 the checks are dated December 21, 1953, and December 5th, 1953. Were those payable on the \$6,000.00 that was due in September then? A. Yes.

Q. Now, can you tell then what is the balance due as far as these records show in December 21,

(Testimony of Doris Moriarty.)

1953? A. That would be \$4,275.74.

Q. And what were the two checks payable for then? A. Logs.

Q. Logs? A. Yes.

Mr. Bantz: I have no further examination, Mr. Moore.

Mr. Moore: Do you know if Mr. Palermo ever received that \$4,275.74? A. No, sir; I don't.

Mr. Moore: That is all.

Mr. Bantz: That is all.

The Court: That is all then. The Court will take a [156] ten-minute recess.

(Whereupon, after the usual morning recess, the following proceedings occurred:)

The Court: You may proceed.

Mr. Bantz: Mrs. Dorothy Legler. Your Honor, before she comes I want to make a record here on—would you hand me Plaintiff's Exhibit 39-40—your Honor, in Plaintiff's Exhibit 38 there are six checks in which the names of James Willman and Joe Palermo appear. I introduced the same for the purpose that they were part of the records of Mt. Adams Association. However, the six checks that are in here have nothing to do with this particular case. They are not included in the summaries or in the income under this particular organization, and I am wondering if you could——

The Court: Those were the checks that were made jointly with another individual?

Mr. Bantz: Yes, they were made jointly, and I

Testimony of Doris Moriarty.)

would like to have it understood that in our summary they are not being included in it and the jury is instructed to disregard it, and I would like to have Mr. Taylor take the six out if that is agreeable.

The Court: I think we have enough documents that it would confuse the jury and I suggest, if counsel have no objection, that they be withdrawn to another number.

Mr. Bantz: That is agreeable. [157].

The Court: 40-a, 38-a. Well, you may withdraw them.

Mr. Bantz: All right, with your permission we will withdraw those checks.

The Court: Is that 39?

Mr. Bantz: No, 38, your Honor.

The Court: All right, they will be taken out of 38, withdrawn from 38.

DOROTHY LEGLER

called and sworn as a witness on behalf of the Government was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. Dorothy Legler.

Q. Mrs. Legler, you are the wife of Wally Legler who was on the stand previously?

A. That is right.

Q. Where do you live, Mrs. Legler?

(Testimony of Dorothy Legler.)

A. At White Salmon.

Q. And how long have you lived there?

A. I have lived there all of my life.

Q. And where are you employed now, Mrs. Legler?

A. S. D. S.

Q. Will you explain what that is, Mrs. Legler?

A. Stevenson, Dobanspeck & Stevenson. It is a partnership. [158]

Q. What kind of operation is that?

A. That is a sawmill operation.

Q. Where is that located?

A. Stevenson, Dobanspeck & Stevenson is located at Bingen, Washington.

Q. Bingen, Washington?

A. Yes.

Q. How long have you been employed there?

A. Since February, 1946.

Q. And what are your duties?

A. Office manager and bookkeeper.

Q. And have you been in that capacity all that time?

A. Yes.

Q. And are you familiar with the books and records of S. D. S. Lumber Company?

A. Yes, sir.

Q. Are they under your supervision?

A. Yes.

Q. And were you issued a subpoena to produce some records in Court today?

A. Yes, I was.

Q. And did you bring them with you?

A. Yes, I did.

Mr. Bantz: Let me have them, please. Will you

(Testimony of Dorothy Legler.)

clip them together and make one exhibit please, Mr. Taylor. [159]

The Clerk: Plaintiff's 41. Plaintiff's 42, 43, 44, and Plaintiff's 45.

Q. Mrs. Legler, handing you Plaintiff's 41, that is part of the records you brought with you today?

A. Yes, it is.

Q. And they have been in the custody of the S. D. S. Lumber Company in your office, is that correct?

A. That's right.

Q. Now, what are those purported to be there?

A. Checks, cancelled checks and purchase invoice statements for logs issued to Joe Palermo in December, 1947—November and December, 1947.

Q. Now, the cancelled checks and the other papers are supporting documents?

A. Yes, purchase invoices.

Q. Purchase invoices? A. Yes.

Q. And what information appears there?

A. The period in which the logs were purchased and the log ticket information and amount of footage and extension of the check.

Q. The extension is the amount that the check would be? A. Yes, that is right.

Q. For what year? A. '47. [160]

Q. Now, handing you Plaintiff's 42, would you examine that exhibit. Do you recognize that?

A. Yes.

Q. And is that part of your records?

A. That is.

Q. And what is that?

(Testimony of Dorothy Legler.)

A. It is the cancelled check and purchase invoice for logs purchased in July of 1948 and the check payable to Joe Palermo.

Q. Now, handing you Plaintiff's 43, would you please examine that. Have you seen that before?

A. Yes, I have.

Q. Was that part of your official records?

A. Yes, it is.

Q. And it is part of the records you brought with you today? A. Yes.

Q. And what is that?

A. It is the cancelled check and purchase invoice for December of 1949, check payable to Joe Palermo and it is for logs.

Q. Yes. And in the other two exhibits, Plaintiff's 41 and 42, that I handed you, what were those checks payable for?

A. For the purchase of logs.

Q. Now, handing you Plaintiff's 44, would you please examine that? [161] A. Yes.

Q. Is your testimony to this check the same as it was to the previous exhibits?

A. It is. It is.

Q. And who is that made payable to?

A. To Joe Palermo.

Q. What is the date, please?

A. August 5, 1950.

Q. And what is that payable to Joe Palermo for? A. Logs.

Q. Handing you Plaintiff's 45 for Identification, will you please examine that exhibit. Have you seen it before? A. Yes, I have.

(Testimony of Dorothy Legler.)

Q. And is your testimony to that check the same as it is to the others? A. Yes.

Q. And you brought it today? A. Yes.

Q. And who is it made payable to?

A. To Joe Palermo.

Q. And what is the date on it?

A. April 25, 1952.

Q. And what would that check be payable for?

A. For logs purchased.

Q. Do you know of any other business that S. D. S. had with [162] Joe Palermo during the years 1950 through 1953? A. No.

Q. Did you search your records, Mrs. Legler, for any other slips or invoices or checks that you had in the file showing any payment or disbursement that you had to Joe Palermo?

A. Yes, I did, and I found nothing.

Q. And you found nothing, is that right?

A. Yes.

Mr. Bantz: I am going to offer Plaintiff's 44 and 45 into evidence, your Honor.

Mr. Moore: No objection.

The Court: They will be admitted.

(Whereupon, said checks, etc., were admitted in evidence as Plaintiff's Exhibits Nos. 44 and 45.)

Mr. Bantz: And I will not at this time offer Exhibits 41, 42 or 43.

Q. Has the S. D. S. Lumber Company done any business with Mr. Palermo since 1953?

(Testimony of Dorothy Legler.)

A. In 1954 and that is——

Q. One check?

A. One check and that is all.

Q. And you do have that with you? [163]

A. Yes, I do.

Q. And that consists of all of the records that you have concerning Mr. Palermo?

A. That's right.

Mr. Bantz: You may examine.

Cross-Examination

By Mr. Moore:

Q. Were the checks issued to Mr. Palermo mailed to him or delivered personally?

A. Well, it is my remembrance that either Mr. Palermo or Mrs. Palermo would pick them up.

Mr. Moore: That is all.

Mr. Bantz: That is all.

(Witness excused.)

Mr. Bantz: Mr. Ackley.

CHARLES ACKLEY

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name please?

A. Charles Ackley.

Q. And where do you live, Mr. Ackley?

(Testimony of Charles Ackley.)

A. Bingen. [164]

Q. Bingen, Washington? A. Yes, sir.

Q. And how long have you been a resident of Bingen? A. Oh, off and on all of my life.

Q. And what business are you in at the present time, Mr. Ackley?

A. I am just hauling logs with a truck of my own.

Q. Your own truck? A. Yes, sir.

Q. And what business have you been following in the past ten years?

A. Sawmilling and logging.

Q. And where were you in the sawmill business? A. In and around Klickitat County.

Q. And about the logging business, where were you in the logging business?

A. In the same district.

Q. In other words, the operations are in that locality? A. Yes, sir.

Q. Do you know Mr. Joe Palermo?

A. Yes, sir.

Q. Have you had business with him in the past? A. Yes, sir.

Q. In what years did you have some business with Mr. Palermo? A. '49, '50, '51, '52. [165]

Q. And what kind of business was that?

A. I bought logs from him.

Q. You bought logs from him? A. Yes.

Q. Did you do any other business with Mr. Palermo? A. No.

Q. All right. Is Mr. Palermo in the courtroom?

(Testimony of Charles Ackley.)

A. Yes, sir.

Q. The same one that you dealt with?

A. Yes, sir.

Q. You know him personally, I take it?

A. Yes, sir.

Q. Now, were you given a subpoena to produce some records in court today? A. Yes, sir.

Q. And did you bring those records with you?

A. I have them here.

Mr. Bantz: May I have them, please. Make one exhibit, please, Mr. Taylor.

The Clerk: Plaintiff's 46, 47, 48, 49.

Q. Mr. Ackley, handing you Plaintiff's 46 for Identification, will you please examine those checks. What are those now?

A. Cancelled checks for logs.

Q. What year are they for?

A. 1949. [166]

Q. And who are they made payable to?

A. Joe Palermo.

Q. And what were the checks to Mr. Palermo for? A. For logs delivered.

Q. Now, handing you Plaintiff's 47 for Identification, would you please examine each check to see that they are signed by you and that they are the proper year. What year are these checks for?

A. 1950.

Q. And who are they payable to?

A. Joe Palermo.

Q. And they are all signed by you?

A. Yes, sir.

(Testimony of Charles Ackley.)

Q. And what are they for?

A. For the purchase of logs delivered to me.

Mr. Bantz. Mr. Moore, do you want me to wait so that you can look at these before we proceed?

Mr. Moore: No, go ahead, I will keep one eye on you.

Mr. Bantz: All right.

Q. Handing you Plaintiff's 48 for Identification, will you examine those and tell me what they are and if you signed them. What are these?

A. Those are cancelled checks issued to Joe Palermo.

Q. For what year?

A. For 1951, for purchase of logs. [167]

Q. For purchase of logs? A. Yes.

Q. Handing you Plaintiff's 49, would you please examine that document there?

A. They must have used chewing gum here——

Q. Now, what is Plaintiff's 49 for Identification, for what is that?

A. Logs purchased from Joe Palermo in 1952.

Q. They are cancelled checks?

A. Yes, sir.

Q. And who are they made payable to?

A. Joe Palermo.

Q. And for the year 1952? A. 1952.

Q. Are they signed by you? A. Yes, sir.

Mr. Bantz: Will you mark that, please?

The Court: Is that 50?

The Clerk: Plaintiff's 50.

Q. Mr. Ackley, handing you Plaintiff's 50 for

(Testimony of Charles Ackley.)

Identification, would you please examine that and state, if you know, what it is?

A. Well, this is my records for purchases of material that was used in operation of the mill, that is the logs and other—— [168]

Q. What years does that cover?

A. '49, '50, '51, '52.

Q. And it shows the people that you purchased logs from during those years? A. Yes, sir.

Q. Does that include the defendant here, Mr. Palermo? A. Yes, it does.

Q. The payments that are shown on Plaintiff's 50 for Identification would be for what reason?

A. I didn't understand.

Q. Why would you be paying the money to any of the individuals on here, for what reason were you paying them, what were you buying from them?

A. Well, some of those records show gasoline and other things but other records show logs purchased from Joe Palermo.

Q. Are there any other things on here for Joe Palermo other than that?

A. There are other things indicated on here.

Q. What do they include?

A. General run of the business.

The Court: I am not sure that the witness understood.

Q. What do they include for Joe Palermo?

A. Oh, no, nothing other than logs for Mr. Palermo, just logs for Mr. Palermo. [169]

(Testimony of Charles Ackley.)

Mr. Bantz: I will offer in evidence 47, 48 and 49.

The Court: 47, 48 and 49?

Mr. Bantz: Yes. I am not offering Plaintiff's 50 or 46, either one.

The Court: Admitted.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits Nos. 47, 48 and 49.)

Mr. Bantz: Your Honor, I would again like permission to go over some checks here and I will go as fast as I can if I may.

The Court: All right.

Mr. Bantz: I am reading from Plaintiff's Exhibit 47 which is a group of checks signed by Mr. Ackley, made payable to Joe Palermo. The first checks start with April 20, 1950, and the last check in the exhibit is December 5, 1950, in the following amounts: \$1,593.71, \$2,736.92, \$3,209.36, \$2,563.96, \$3,475.14, \$4,273.50, \$2,800.80, \$2,612.10, \$2,827.50, \$3,363.30, \$2,832.96, \$2,359.74, \$594.00, \$516.40.

Reading from Plaintiff's Exhibit 48, which is a group of checks signed by Mr. Ackley made payable to Mr. Palermo, the first check dated April 20, 1951, and the last check December 20, 1951, in the following amounts: \$2,875.58, \$4,151.12, \$3,750.40, \$3,244.82, \$2,250.98, \$5,053.97, \$4,512.32, \$4,841.35, \$3,922.56, \$4,948.68, \$1,281.09, \$3,130.12, \$2,241.86, \$4,387.82. [170]

Reading from Plaintiff's Exhibit 49, a group of checks signed by Mr. Ackley, made payable to Joe

(Testimony of Charles Ackley.)

Palermo, the first check dated April 19, '52, the last check dated September 29, 1952, in the following amounts: \$2,709.88, \$3,755.50, \$6,022.12, \$5,543.09, \$4,078.32, \$5,041.34, \$2,557.91, \$4,883.92, \$4,436.92, \$3,668.04, \$1,799.64.

Q. Mr. Ackley, did you check your records to see if you had any additional checks that were made payable to Mr. Palermo during the years of 1950 through 1953? A. I have.

Q. And did you find any additional checks?

A. I did not.

Q. I take it, then, that that is all of your business transactions with Mr. Palermo?

A. That's right.

Mr. Bantz: You may examine.

Cross-Examination

By Mr. Moore:

Q. Mr. Ackley, on Plaintiff's Exhibit for Identification 50 there are some red checks there right by the numbers in here. Do you know if that was done by someone working for you?

A. No, that was done by me in fishing out the checks I was asked to. [171]

Q. Oh, I see, you were just checking off what you had found and what you had not found?

A. Yes, sir.

Q. As I understand it, you had some tough luck in '51, '52 and '53 in your milling operation?

A. Yes, that's right.

Testimony of Charles Ackley.)

Q. What happened?

A. The fire destroyed the mill.

Q. And put you out of business?

A. That's right.

Q. And at that time Mr. Palermo had an account owing from you to him for logs, is that right?

A. That is right.

Q. And that account still stands?

A. That is right.

Q. In other words, he still has some money coming from you? A. That's right.

Q. And you haven't been able to pay him?

A. That's right.

Q. Has there been any trouble in business dealings with you and Mr. Palermo?

A. Not to my knowledge.

Q. As far as you know he has always done all right? A. As far as I know. [172]

Q. Was there anything that you ran into in your business dealings with him which wasn't fair on his part?

Mr. Bantz: Your Honor, I would object as being beyond the direct examination. It is going into character references. He is entitled to put him on the stand for that.

The Court: Yes, I think so, yes.

Mr. Moore: I think that is all.

The Court: Any other questions?

Mr. Bantz: No, no questions.

The Court: That is all then.

(Witness excused.)

Mr. Bantz: Mr. Sprague, please.

THEODORE SPRAGUE

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please?

A. Theodore Sprague.

Q. And where do you live, Mr. Sprague?

A. White Salmon, Washington.

Q. And how long have you lived there?

A. Since 1945.

Q. And what business are you engaged in? [173]

A. Sawmilling.

Q. And how long have you been in the sawmill business?

A. Since 1953.

Q. And were you in a partnership at one time?

A. Yes, with Mr. Seaton.

Q. And what was that called?

A. Seaton and Sprague.

Q. Are you in business still with Mr. Seaton?

A. No, he is retired.

Q. He is retired. And you run your own mill now?

A. That is right.

Q. And do you know Mr. Joe Palermo?

A. Yes, sir.

Q. Is he in the courtroom?

A. Yes, sir.

Q. Sitting—

A. Right by you.

Q. Have you done some business in the past in—

(Testimony of Theodore Sprague.)

dividually or through a partnership with Mr. Palermo? A. Yes.

Q. And when was that? A. Since 1953.

Q. Was that individually or through Seaton and Sprague? A. Seaton and Sprague in 1953.

Q. Now, you were issued a subpoena to produce certain checks [174] and records in connection with this case, is that right?

A. Yes, that is right.

Q. And did you bring them with you?

A. That's right.

The Clerk: Plaintiff's 51.

Q. Mr. Sprague, would you please examine Plaintiff's Identification No. 51 and tell me what they are and if that is in your custody?

A. These are cancelled checks made out to Joe Palermo.

Q. For what year? A. For the year 1953.

Q. And who were they signed by?

A. By myself and one check was signed by Mr. Seaton, my partner.

Q. And you recognize his signature?

A. Yes, I do.

Q. Part of the business of Seaton and Sprague?

A. Right.

Q. And what were these cancelled checks paid for? A. Logs.

Q. To Mr. Palermo? A. Yes, that's right.

Q. In the use of your mill?

A. That's right.

(Testimony of Theodore Sprague.)

Mr. Bantz: I will offer in evidence Plaintiff's 51. [175]

Mr. Moore: No objection.

The Court: Admitted.

(Whereupon said group of checks was admitted in evidence as Plaintiff's Exhibit No. 51.)

Mr. Bantz: Your Honor, I would like to take a moment again, there is just five or six, a very few of these, and read them to the jury.

The Court: All right.

Mr. Bantz: Excuse me, is that all right?

The Court: Yes, I said all right.

Mr. Bantz: Plaintiff's Exhibit 51, the first check being in the amount of—being dated 8/22/53, and the last check dated November 10, 1953, the first check in the amount of \$7,282.81, the second check in the amount of \$3,837.45. The next check in the amount of \$5,063.99, the next in the amount of \$6,806.12, and \$4,836.55, and \$4,119.65.

Q. Mr. Sprague, did you have any other business in the year 1953 with Mr. Palermo? A. No.

Q. And have you paid him any other monies, other than Plaintiff's Exhibit 51? A. No.

Q. Did you have any business prior to 1953? [176]

A. No.

Mr. Bantz: You may examine.

Mr. Moore: No questions.

The Court: That will be all, Mr. Sprague.

(Witness excused.)

Mr. Bantz: Mr. Bolter.

A. M. BOLTER

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. A. M. Bolter.

Q. And, Mr. Bolter, where do you reside?

A. At Bingen, Washington.

Q. And what business are you engaged in?

A. In the lumber business.

Q. Lumber business? A. Yes, milling.

Q. In the mill business? A. Yes.

Q. Now, are you familiar with a man who just passed away by the name of Landgraf?

A. Yes, he was my partner in the business. [177]

Q. And when did Mr. Landgraf pass away?

A. A week ago last Friday, the 12th.

Q. Of your own knowledge do you know whether I had asked him to come to this trial?

A. Yes, I do. Yes, I do.

Q. And are you familiar with the records and books concerning the operation between you and Mr. Landgraf? A. Yes, sir.

Q. Did you office together or near each other?

A. Oh, yes, we officed together.

Q. In what city? A. In Bingen.

Q. And now, did you receive a subpoena in which

(Testimony of A. M. Bolter.)

you were to bring certain papers and records with you? A. Yes, sir.

Q. And did you bring them with you?

A. Yes, sir.

Q. And may I have them, please. Would you tell me, do those two articles go together?

A. Yes, sir.

Q. And do these two checks go with this paper?

A. Yes.

Q. Is that a separate item now? A. Yes.

Q. That is a separate item? [178]

A. Yes, it is.

Mr. Bantz: Would you separate, please, the yellow sheet from the other two and make each one an exhibit?

The Clerk: Plaintiff's 52, Plaintiff's 53 and 54.

Q. Mr. Bolter, handing you Plaintiff's 52, 53, and 54, would you examine those, please?

A. Yes.

Q. Have you seen those before? A. Yes.

Q. And what is the Plaintiff's 52?

A. It is for 1952.

Q. Yes?

A. A check for Mr. Joe Palermo for "cat" rental.

Q. Will you speak up?

A. A check for "cat" rental for 1952.

Q. I notice this signature on here is not your signature?

A. Well, this first check is made by Ray Landgraf. He had rented the "cat" along and then after

(Testimony of A. M. Bolter.)

this check he and I as a partnership took over the "cat" and rented it, and here is the other check.

Q. Do you recognize the signature of Mr. Landgraf?
A. Yes, sir.

Q. Did you discuss this matter with him personally before that took place?

A. Yes. Yes, because he took care of it in the payment of [179] the co-partnership.

Q. Now, this is dated May 22, 1952?

A. Yes, sir.

Q. Now, handing you Plaintiff's 53, this is part of the records that you brought with you?

A. Yes, sir.

Q. What is that exhibit?

A. That is for the "cat" rental for the year 1952.

Q. And there are two cancelled checks?

A. Yes, sir.

Q. And some supporting documents?

A. Yes,

Q. And these are not signed by you again, is that right?

A. No, he kept the books and signed all checks. I could co-sign checks.

Q. You recognize the signature on both checks?

A. Yes. Oh, yes.

Q. And you know personally what they are for?

A. Yes.

Q. Will you please examine Plaintiff's 54?

A. Yes.

Q. What is that?

(Testimony of A. M. Bolter.)

A. Well, that is our notation of the amount of rent that was due on the "cat."

Q. And that is for—— [180] A. For rent.

Q. For rent? A. Yes, for rent.

Q. And do you know whether Plaintiff's 54 is part of one of the other exhibits?

A. Well, I wouldn't be too sure about that.

Q. But it is part of your records?

A. Yes, absolutely.

Q. And all of these checks are made payable to who? A. Palermo.

Q. And do you know Mr. Palermo?

A. Oh, yes.

Q. And is he here in the courtroom?

A. Yes, sir.

Mr. Bantz: Your Honor, may I withdraw Plaintiff's 54 and attach the same to Plaintiff's—what is the one I have?

Mr. Moore: 53.

Mr. Bantz: May I attach it to Plaintiff's 53 as the testimony shows that they should be together.

The Court: All right.

Mr. Bantz: I will offer Plaintiff's Exhibits 52 and 53 into evidence, your Honor.

Mr. Velikanje: Are you going to have a new No. 54?

The Court: I think that the record will show that 54 [181] has been withdrawn and attached to 53, and so No. 54 will be open for the next exhibit that comes along.

Mr. Velikanje: Yes.

(Testimony of A. M. Bolter.)

Mr. Moore: May I inquire?

The Court: Yes.

Q. (By Mr. Moore): On this Exhibit 53 for identification, the yellow slip in the back dated August 16, 1952, there is "Joe Palermo, White Salmon, 66 hrs." Is that a statement you had received from Mr. Palermo?

A. No, this is Mr. Landgraf's handwriting. It is Mr. Landgraf's handwriting.

Q. Mr. Landgraf made that statement out?

A. Yes, that was for "cat" rental.

Q. In other words, Mr. Landgraf for you and Mr. Landgraf kept a record of what was owing to the company?

A. Yes, for the Bolter & Landgraf Lumber Company.

Q. Was there any other dealings between you and Mr. Palermo other than the "cat" rental?

A. Not that year, not in '52.

Mr. Bantz. Any objection?

Mr. Moore: No objection.

The Court: They will be admitted.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits Nos. 52 and 53.) [182]

Mr. Bantz: You may examine.

The Clerk: Marking Defendant's Exhibit 54.

Mr. Bantz: That is Defendant's Exhibit 54, Mr. Taylor?

(Testimony of A. M. Bolter.)

The Clerk: Yes.

The Court: All right.

Cross-Examination

By Mr. Moore:

Q. Handing you Defendant's 54, would you state what that is?

A. Well, it is the number of hours.

Mr. Bantz: I can't hear you, Mr. Bolter.

The Court: You will have to speak up.

A. It is the number of hours.

The Court: Oh, yes. What number of hours?

A. For rental on this "cat."

Q. (By Mr. Moore): I think you better read it again, I am not trying to trap you. I don't understand here.

A. Well, it was rental on caterpillar tractor, tractor rent.

Q. Well, that is a statement from Mr. Landgraf dated May 22nd, 1952, is it not?

A. \$221.27 to Joe Palermo.

Q. To Joe Palermo?

A. Yes, to Joe Palermo.

Q. It is 31,609 feet at \$10.00. Were you paying \$10.00 per thousand? [183]

A. No, that would apply to stumpage that we paid for the lumber cut and he happened to make notation for that on one slip. That "cat" rental was in here.

Q. Well, I am referring to that check for

Testimony of A. M. Bolter.)

221.27, which is the same amount which is set forth
n there? A. Yes.

Q. Now, were you paying \$10.00 a thousand for
he use of the "cat"? A. No, \$3.50 an hour.

Q. \$3.50? A. Yes.

Q. But this does recite lumber cut and delivered,
o many thousands at \$10.00?

A. Yes, that would apply to the stumpage.

Q. Do you mean that could be a statement?

A. That \$10.00 would apply to stumpage that
was paid.

Q. Well, this check for \$221.27, what is that?

A. Well, that was this deal alone. That was Mr.
Landgraf's individual check, and then in this period
ne company took over the rental of the caterpillar
also and the other checks were written by Bolter
nd Landgraf, and this one was an individual deal
with Mr. Palermo.

Q. And so it would be stumpage as well as cater-
pillar rental?

A. That is correct. That is correct.

Mr. Moore: I see. That is all. [184]

The Court: Any other questions?

Redirect Examination

By Mr. Bantz:

Q. The money, Mr. Bolter, shown on the checks,
Plaintiff's 52 and 53 and Defendant's 54 for Iden-
tification that you just looked at, the \$221.27, was
aid to Mr. Palermo?

A. Yes, this amount \$221.27.

(Testimony of A. M. Bolter.)

Q. Plus the other monies as shown on the checks?

A. No. This money here wouldn't have been paid to Mr. Palermo.

Q. Who would that have been paid to?

A. William Jacobson.

Q. In other words, the Defendant's 54 wasn't payable to Mr. Palermo?

A. No, that wasn't paid to Mr. Palermo.

Q. Was the money paid to Mr. Palermo concerning Plaintiff's Exhibits 52 and 53 that you just looked at? What is your answer, yes or no?

A. Well, I am still confused.

Q. This money shown on here, Plaintiff's 52 and 53, was paid to Mr. Palermo? A. Yes, it was.

Mr. Bantz: That is all.

Mr. Moore: Just a minute.

The Court: Just a moment, any other questions? [185]

Mr. Moore: Yes.

Recross-Examination

By Mr. Moore:

Q. I don't doubt that this money was paid to Mr. Palermo, Mr. Bolter, but Exhibit 52, which you said is for "cat" rental, recites on it, and it is only apparently to Mr. Landgraf, recites, "May 22, 31,609 feet" and then it credits \$316.09, and then there is a deduction for labor to Jacobson for \$94.82, and then there is a check for \$221.27 on May 22, 1952. Now, that ties in completely with Exhibit 54?

Testimony of A. M. Bolter.)

A. Yes.

Q. And so it couldn't have been "cat" rental, that is what I want to get straight, it isn't "cat" rental, it is stumpage, 31,609?

A. No, \$221.27 was "cat" rental. I remember that myself, and the other money was paid to the operator of the "cat." I wasn't the partner in the deal when it happened, and it happened individually, and thereafter we took this over in the co-partnership.

Q. This is the co-partnership in Exhibit 53?

A. Yes, Bolter and Landgraf Lumber Company.

Q. And June 30th says, in Plaintiff's Exhibit 52, "15,595 feet of logs at \$10.00." Now, is that stumpage?

A. Well, that could have been the scale of what we did with [186] the "cat" or it could have been the stumpage or it could have been lumber, and it doesn't say there.

Q. It just says so many thousand feet on the logs?

A. Scale on the logs. He evidently was paying the man by the thousand to drive the "cat," that is what it amounted to.

Mr. Moore: That is all.

The Court: Any other questions of this witness?

Mr. Bantz: No, thank you, your Honor.

(Witness excused.)

The Court: The court will recess until one-thirty.

July 24, 1957, 1:30 P.M.

The Court: You may proceed.

Mr. Bantz: Please mark this for identification

The Clerk: Plaintiff's 55, your Honor.

Mr. Bantz: Would you please mark these checks?

The Clerk: And 56.

The Court: Plaintiff's 55 and——

The Clerk: 55 and 56.

The Court: All right.

Mr. Bantz: Your Honor, on Plaintiff's No. 55 for Identification, there are two checks, one dated November 21, 1952, in the amount of \$315.36, and one dated December 22, 1952, [187] in the amount of \$1,857.60, both made payable to Joe Palermo, and are issued by Highland Lumber Company at White—or at Bingen, Washington. Counsel and I have stipulated that they were in payment of logs from Highland Lumber Company for payment to Joe Palermo. Highland Lumber Company is not available now, and these are duplicate copies of original checks.

Mr. Moore: It is so stipulated.

The Court: All right, it will be admitted.

The Clerk: That is 55.

(Whereupon, said checks (2) were admitted in evidence as Plaintiff's Exhibit No. 55.)

Mr. Bantz: Your Honor, in Plaintiff's Exhibit 56 for Identification is a check in the amount of \$100.00 from J. Hofert Company, at Seattle, Washington, and made payable to Joe Palermo and

drawn on the Seattle-First National Bank, and it is stipulated between counsel that we can produce the original, although we could get testimony as to this particular check. It is in the correspondence that J. Hofert Company paid to Joe Palermo in the sum of \$100.00, and I move for admittance on that basis.

Mr. Moore: No objection.

The Court: It will be admitted. [188]

Mr. Velikanje: What is the date of the check?

Mr. Bantz: August 1, 1952, is the date of the check.

The Clerk: 56.

(Whereupon, said check was admitted in evidence as Plaintiff's Exhibit No. 56.)

Mr. Bantz: Mr. Courtney, please.

JOSEPH COURTNEY, JR.

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. Joseph Courtney, Jr.

Q. Can you hear me all right, Mr. Courtney?

A. Yes.

Mr. Bantz: If you can't hear now you just speak up because I want you to hear each question.

Q. Where do you reside, Mr. Courtney?

A. Bingen, Washington.

Q. Where? A. Bingen, Washington.

(Testimony of Joseph Courtney, Jr.)

Q. And how long have you lived there? [189]

A. Oh, I have lived in that vicinity for forty-two years.

Q. All right. And what business are you in now?

A. I am employed by S.D.S. Lumber Company.

Mr. Moore: S. D. S. Lumber Company?

A. Yes, that's right.

Q. (By Mr. Bantz): What business were you engaged in in 1949 and 1950?

A. I ran the sawmill.

Q. And where was the sawmill located?

A. On the Snowden Road, Klickitat County.

Q. That is down by Bingen somewhere?

A. Yes.

Q. Do you know a man by the name of Joe Palermo? A. Yes.

Q. Is he in the courtroom? A. Yes, sir.

Q. Have you had business with Mr. Palermo?

A. Yes.

Q. Did you get a subpoena to produce some records in court today? A. Yes; I did.

Q. And did you bring the records with you?

A. Yes; I did.

Q. Have you marked it in here, in this book, the pages that I—concerning the subpoena that I asked you to produce [190] the records?

A. Yes. That is 1949.

Mr. Bantz: All right. Your Honor, I am going to have this marked, the whole book, and will offer the book with the understanding that it will be—there are just certain pages pertaining to the de-

(Testimony of Joseph Courtney, Jr.)

pendant in there and I have photostatic copies and after the defense counsel has examined it, if he wishes, just for the purpose of saving bulk in there, I would like to be able to substitute the photostats after they have compared them.

The Court: If there is no objection.

Mr. Moore: No objection.

The Clerk: I will mark the book and mark the photostatic copies and as soon as I can give those sub-numbers, it will be Plaintiff's 57 for Identification.

Q. Mr. Courtney, handing you Plaintiff's 57 for Identification, I take it this is a book that you brought with you? A. That's right.

Q. Now, what do you have in this book; what is it?

A. I have the records of logs that I purchased.

Q. While you were in the logging business?

A. Yes.

Q. All right; in here are there some records concerning Joe Palermo?

A. Yes; there are. [191]

Q. Will you just show me where they are in this book? A. They are here.

Q. Now, you are pointing to Page 60 in the book, is that correct? A. Yes.

Q. All right. Now, I notice that you have got some clips?

A. That is the total amount of logs that I purchased from him.

Q. Speak up.

(Testimony of Joseph Courtney, Jr.)

A. That is the total amount of logs that I purchased from him in——

Q. Will you please speak up so the jury can hear you?

A. This is the record of the total amount of logs that I bought from Joe Palermo in 1949.

The Court: And what page is that?

Q. That is page 85, is that correct?

A. Yes.

The Court: Page 85 is the total?

Q. For the year 1949? A. Yes.

Mr. Velikanje: I thought you said 60.

The Court: That is the first page.

Q. We started on Page 60 but the total is on Page 85, is that correct? A. Yes. [192]

Q. Both for the year 1949?

A. That's right.

Q. Now, you have one other clip in here in which is Page 95, is that correct?

A. That's right.

Q. Now, Page 95 to 110, or just Page 95?

A. Yes.

Q. Now, what does that concern?

A. That is logs that I purchased from Joe Palermo in 1950.

Q. And on Page 95, to the best of your knowledge, does it show all of the logs that you purchased from Joe Palermo in the year 1950?

A. Yes.

Q. Now, Mr. Courtney, to the best of your ability do you know if there are any other purchases in

(Testimony of Joseph Courtney, Jr.)

here concerning Mr. Palermo? A. No.

Q. No? A. That's right.

Mr. Bantz: Your Honor, if I may just have a moment on comparison here (comparing documents with Mr. Moore). Your Honor, on Page 95 for the year 1950 I am substituting, or giving a photostatic copy to the Clerk and ask that it be Plaintiff's 57 or whatever number he desires on it. Is that [193] "A"?

The Clerk: "A."

Mr. Bantz: I am going to move for the admission of 57-A as it deals with the year 1950, your Honor.

The Court: All right.

Mr. Bantz: And I might add that there are other names in the Exhibit 57-A, other than Joe Palermo but we are only dealing with the name of Joe Palermo.

The Court: The jury will consider only the reference to Joe Palermo and not the other individuals on the exhibit.

Q. (By Mr. Bantz): Mr. Courtney, do you have any cancelled checks for these?

A. No; I have not.

Q. These are the only records you have concerning these? A. Yes; that is right.

Mr. Moore: Payment was made by check, Mr. Courtney?

A. Payments were made by check.

Mr. Moore: As reflected in here?

A. Yes; that's right.

Mr. Moore: No objection.

(Testimony of Joseph Courtney, Jr.)

The Court: It will be admitted. 57-a.

(Whereupon, said photostatic copy was admitted in evidence as Plaintiff's Exhibit No. 57-A.)

Q. (By Mr. Bantz): Mr. Courtney, referring to Plaintiff's [194] Exhibit 57-A—put your glasses back on so that you can see here now—you will see an item dated January 30—— A. June 30.

Q. June 30th. Oh, you see better than I do. June 30th, Joe Palermo, 31,100 truck.

A. That was on logs——

Q. Speak up, please.

A. That was some logs that I purchased from Joe Palermo, and that \$933.00 was credited to him on a truck that he had purchased from me.

Q. In other words, you gave him credit instead of paying him a check? A. That is correct.

Q. Now, referring again, Mr. Courtney—I am referring to Plaintiff's Exhibit No. 57-A—Joe Palermo, \$433.62, that was by check?

A. Yes; that's right.

Q. On May 8, Joe Palermo, \$455.84, that was by check? A. Yes.

Q. And Joe Palermo, June 20th, \$172.50, by check?

A. By check.

Q. And June 30th, that is the item I went over concerning the truck? A. Yes.

Q. And July 21st? [195] A. \$437.10.

Q. \$437.10? A. That's right.

(Testimony of Joseph Courtney, Jr.)

Q. And that was by check?

A. Yes; by check.

Q. And what were those checks for?

A. For logs purchased.

Q. And also \$933.00, what was that for?

A. For logs purchased.

Q. And also you did it on a credit basis?

A. That's right.

Q. Do you know if you have ever done any other business with Mr. Palermo as to logs other than what is listed in your books, Mr. Courtney?

A. No.

Q. In other words, everything you can recall is on your books there? A. That's right.

Mr. Bantz: You may examine.

Cross-Examination

By Mr. Moore:

Q. When did you sell the truck to Mr. Palermo?

A. I sold the truck to—I can't remember the exact date but it was some time in 1950. In the Spring of 1950.

Q. Some time in 1950? [196]

A. Yes; that's right.

Q. What kind of truck was it?

A. It was a Ford logging truck.

Q. With a trailer or without a trailer?

A. No; it was a solo rig.

Q. Was that price \$933.00?

A. No; it wasn't.

Q. How much was the truck? A. \$1,600.00.

(Testimony of Joseph Courtney, Jr.)

Q. Did he pay you the difference between the \$933.00 and \$1,600.00 when he got the truck?

A. No; not when he got the truck but when we settled up in the fall Joe paid me in full.

Q. Do you have a written contract with you?

A. No; I don't have a written contract with me.

Q. You just gave him the truck and told him how much it was going to be and he paid you eventually?

A. That is right. He was delivering logs.

Mr. Moore: That is all.

Redirect Examination

By Mr. Bantz:

Q. Mr. Courtney, was Mr. Palermo delivering logs to your sawmill with the truck?

A. Yes; he did.

Mr. Bantz: Nothing further. [197]

Mr. Moore: No further questions.

The Court: That is all, Mr. Courtney.

(Witness excused.)

EDWARD LAWSON

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please?

A. Edward Lawson.

(Testimony of Edward Lawson.)

Q. And where do you reside, Mr. Lawson?

A. Portland, Oregon.

Q. And what is your occupation?

A. I am office manager for Columbia-Hudson Lumber Company.

Q. Where is Columbia-Hudson Lumber Company located?

A. Bradwood, Oregon.

Q. And where is Bradwood, Oregon?

A. It is twenty miles east of Astoria.

Q. Twenty miles east of Astoria?

A. Yes.

Q. And how long have you been with the Columbia-Hudson Lumber Company?

A. Since March, 1954.

Q. Did you say since 1954 you have been with them? [198]

A. Yes.

Q. And did you have a subpoena issued you to bring some records here to the trial today?

A. Yes; I did.

Q. And you brought them, didn't you?

A. Yes.

Mr. Bantz: I think those are Plaintiff's 33 and 34, Mr. Taylor, identifications.

Q. Mr. Lawson, where all does Columbia-Hudson Lumber Company deal in logs or in lumber?

A. Well, they obtain logs from the—in the pass up in Washington, I suppose up in Lyle and some spots down the river and they were towed down the river to the mill.

Q. And after they were towed down, where were the checks issued in payment for those logs?

(Testimony of Edward Lawson.)

A. Our office in Portland issues those checks.

Q. And that is the type of business you have been doing with them since 1954? A. Yes.

Q. Now, I believe you had a subpoena to bring records for the years of 1947 and 1948, is that correct? A. No; I think it is 1948 and 1949.

Q. Pardon me, 1948 and 1949?

A. Yes, sir.

Q. And where did you get the records that you brought? [199]

A. Well, the records were at our mill at Bradwood in storage.

Q. Did you have them sent down to you?

A. They were sent up to Portland, Oregon.

Q. Into Portland, Oregon? A. Yes.

Q. Now, handing you Plaintiff's 33, will you examine that? Is that the group of records that you brought concerning the year 1948?

A. Yes; it is.

Q. And were they from your files up at Bradford, Oregon? A. No; Bradwood.

Q. Bradwood, Oregon?

A. Yes; Bradwood.

Q. How would you classify these?

A. Well, these are checks issued in payment of logs with the supporting invoices.

Q. The invoices cover the breakdown as to what the total amount for certain checks?

A. Yes; that's right.

Q. And they are for your company that you are bookkeeper for? A. Yes; that's right.

(Testimony of Edward Lawson.)

Q. And who were they made payable to?

A. To Joe Palermo.

Q. Do you recognize the signatures on the checks here? [200]

A. Yes; I do.

Q. And did you look through these checks before you came here to be sure that they were all from your company?

A. Yes; I have.

Q. Now, looking at Plaintiff's Exhibit 34 for identification, are they part of the records that you brought with you today?

A. Yes; they are.

Q. And are they some of the ones that you received from Bradwood, Oregon?

A. Yes; they are.

Q. And do you recognize the signatures?

A. Yes; I do.

Q. And who are they payable to?

A. To Joe Palermo.

Q. And for what year?

A. For the year 1949.

Q. All of them are for the year 1949?

A. Yes.

Q. All right. What would the checks in Plaintiff's 33 and 34 be issued for?

A. For logs.

Q. Mr. Lawson, did you bring any other papers or documents with you?

A. No; I did not. [201]

Mr. Bantz: You may examine.

Mr. Moore: No questions.

The Court: That is all, then.

(Witness excused.)

Mr. Bantz: Mr. Anderson, please. Just step right up.

R. T. ANDERSON

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. R. T. Anderson.

Q. And, Mr. Anderson, where do you reside?

A. White Salmon, Washington.

Q. And in what occupation are you engaged?

A. In accounting.

Q. And how long have you been in the accounting business?

A. Eleven years.

Q. And have you been eleven years at White Salmon?

A. Well, my office is in Bingen.

Q. Well, in that locality you have been there eleven years?

A. Yes.

Q. Now, are you familiar with a man by name of L. C. Coleman? [202]

A. Yes; I am.

Q. And what was your relationship with Mr. Coleman?

A. Bookkeeper.

Q. You did accounting or bookkeeping work for him?

A. Yes, sir.

Q. Are you familiar with the name "Jackknife Mill"?

A. Yes.

Q. And what is your relationship as to the Jackknife Mill?

A. Bookkeeping.

Q. Bookkeeping?

A. Yes.

(Testimony of R. T. Anderson.)

Q. Were you issued a subpoena to bring some records here with you? To bring them into court were you issued a subpoena? A. Yes.

Q. And you brought them with you?

A. Yes.

Mr. Bantz: May I have them?

The Clerk: Plaintiff's 58 and 59 and 60.

Q. Mr. Anderson, handing you Plaintiff's Exhibit 58 for Identification, will you state what that is, please?

A. It is a check payable to Joe Palermo for—

Q. Speak up now because these people have to hear you, Mr. Anderson.

A. A check made payable to Joe Palermo for \$1,368.00 signed [203] by L. C. Coleman on the Jackknife Mill.

Q. What is the date of that check?

A. October 31, 1952.

Q. And handing you Identification 60, will you examine that, please? Do you recognize the Plaintiff's Exhibit 60 for Identification? A. Yes.

Q. What is that?

A. Part of the journal sheet.

Q. What company is it from?

A. From the Jackknife Mill.

Q. Were you the accountant for Jackknife Mill?

A. Yes.

Q. And was that Exhibit 60 prepared either by you or in your office?

A. Prepared in my office.

Q. In your office? A. Yes.

(Testimony of R. T. Anderson.)

Q. Now, referring down to Line 27 on the face of Plaintiff's 60, there is the name of Joe Palermo. Do you see that? A. Yes, sir.

Q. And also then what is the figure on the right-hand side as to the amount of the check?

A. \$1,368.00.

Q. By comparison does that appear to be the same—or for the [204] check on Plaintiff's Exhibit 58, does that appear to be the same as on Plaintiff's 60 for Identification? A. Yes; it does.

Q. And do you know what this check was for?

A. Well, it indicates here that it was for log purchases.

Q. All right; that is on the right-hand side of Plaintiff's Exhibit 60 for Identification?

A. Yes.

Mr. Bantz: I will offer Plaintiff's 58 and 60, and, I might state, your Honor, as to Plaintiff's 60 for Identification I am only concerned with Line 27, which states the name of Joe Palermo in the sum of \$1,368.00, and the words "Log Purchases." Otherwise, I believe it is immaterial to this case.

Mr. Moore: No objection.

The Court: It will be admitted. 58 and 60.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits Nos. 58 and 60.)

Q. Mr. Anderson, handing you Plaintiff's Exhibit 59 for Identification, state what those are, will you, please?

(Testimony of R. T. Anderson.)

A. They are also cancelled checks.

Q. And who are they made payable to?

A. They are all made payable to Joe [205] Palermo.

Q. Now, is your signature on those checks?

A. Yes; it is.

Q. And will you just tell me why is your signature on there?

A. Well, it was requested by——

Q. I mean you are a co-signer on those checks, is that it? A. Yes.

Q. And you can identify them from your own signature, can you? A. Yes; I can.

Q. And what account are these checks drawn on?

A. Jackknife Mill.

Q. And for what year are these concerned?

A. In 1953.

Q. Mr. Anderson, what were these checks issued for? A. For logs—for log purchases.

Q. For the year 1953? A. Yes.

Q. And would that be from Joe Palermo?

A. Yes.

Mr. Bantz: I will offer in evidence Plaintiff's 59.

Mr. Moore: No objection.

The Court: It is admitted.

(Whereupon, said group of checks was admitted in evidence as Plaintiff's Exhibit No. 59.) [206]

Mr. Bantz: Pardon me, I am sorry. If I may, I

(Testimony of R. T. Anderson.)

want that a moment, your Honor, in order to read it.

The Court: All right.

Mr. Bantz: Plaintiff's Exhibit 58 is a check in the amount of \$1,368.00 drawn to Joe Palermo by Jackknife Mill. Plaintiff's Exhibit 59 are checks drawn by Jackknife Mill to Joe Palermo starting with February 16, 1953, and ending with May 19, 1953, in the amounts of \$78.12, \$111.24, \$2,271.68, \$3,615.35, \$2,388.68, \$3,747.57, \$3,870.10, \$5,046.28.

You may examine, Mr. Moore.

Cross-Examination

By Mr. Moore:

Q. Mr. Anderson, did you get these checks and that ledger sheet from Mr. Coleman?

A. Yes, sir.

Q. The ones that you brought up here?

A. Yes, sir.

Q. Are those the only records Mr. Coleman had with reference to Joe Palermo selling logs in 1952 and 1953?

A. That is all that he gave me.

Q. That is all that he gave you?

A. Yes.

Q. Was he the sole owner, Mr. Coleman, of the Jackknife Mill, as far as you know?

A. I think he was at that time. [207]

Q. And is that mill no longer in existence, I mean, as the Jackknife Mill owned by—

A. Not as the Jackknife Mill, no.

Q. What happened to the Jackknife Mill, did

(Testimony of R. T. Anderson.)

it go broke? A. Yes; it did.

Q. And do you know whether or not Mr. Palermo received all the money from the Jackknife Mill that he had coming for logs sold?

A. I am not certain that he did.

Mr. Moore: I think that is all.

Mr. Bantz: That is all, Mr. Anderson.

(Witness excused.)

Mr. Bantz: Mr. Blankenship, please.

DONALD M. BLANKENSHIP

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. Donald M. Blankenship.

Q. And where do you live, Mr. Blankenship?

A. Presently residing at Seattle, Washington.

Q. And where did you reside in the years 1953 to 1955? A. Yakima, Washington.

Q. And who is your employer? [208]

A. District Director of Internal Revenue.

Q. You work for the Internal Revenue Service?

A. Yes.

Q. And what is your position with the Internal Revenue? A. Internal Revenue Agent.

Q. And when did you become an Internal Revenue Agent? A. November 13, 1950.

(Testimony of Donald M. Blankenship.)

Q. Where did you go to college?

A. University of Washington.

Q. What did you take?

A. Majored in Accounting.

Q. Are you a licensed C.P.A.?

A. Yes, sir.

Q. And what does C.P.A. mean?

A. Certified Public Accountant.

Q. Now, Mr. Blankenship, are you familiar with the case of the United States vs. Joe Palermo?

A. Yes, sir.

Q. And did you participate in that case as part of your duties with the Internal Revenue Department?

A. Yes, sir.

Q. Now, I asked you to bring certain records with you into court today. Did you bring those with you?

A. Yes, sir.

The Clerk: Marking Plaintiff's 61, 62, 63. [209]

Q. Let me just ask him a question: Was this attached to one of the other ones?

A. Yes, sir.

Q. Which one, do you know?

A. No.

The Clerk: Plaintiff's 64 and 65.

Mr. Bantz: Mark those separately, Mr. Taylor.

Q. Are all those separate sheets or together?

A. Separate.

The Clerk: 66, 67, 68, 69.

Mr. Bantz: Each one separately unless they are clipped together.

The Clerk: The remaining ones will be 70 to 74.

Q. Mr. Blankenship, do you know Mr. Palermo?

A. Yes, sir.

(Testimony of Donald M. Blankenship.)

Q. And he is the defendant in this case?

A. Yes, sir.

Q. The one that we are talking about?

A. Yes.

Q. Now, I am handing you Plaintiff's Identification 61; would you state what that is and if there is any date on it?

A. This is the Power of Attorney submitted to me by Mr. Moore, authorizing him to act before the Treasury Department for Mr. Palermo and received by me on [210] December 23, 1954.

Q. Handing you Plaintiff's Exhibit 62 for Identification, will you state what that is, please?

A. This is Power of Attorney authorizing I. Allen Brown, C.P.A., to act for Joe Palermo. This hasn't the date on it but I do recall it was received around October 19, 1954.

Q. And they are authorized to act in what?

A. To represent the taxpayer before the Treasury Department.

Q. Handing you Plaintiff's Exhibit 63 for Identification, will you state what that is?

A. This is another Power of Attorney authorizing I. Allen Brown, C.P.A., to act before the Treasury Department to represent Bertha Palermo, and it would be received around February—or December, 1954.

Q. Handing you Plaintiff's Exhibit 64 for Identification, will you state what that is?

A. This is Power of Attorney naming I. Allen Brown and John S. Moore, and E. F. Velikanje to

(Testimony of Donald M. Blankenship.)

act for Joe Palermo before the Treasury Department, dated November 28, 1955.

Q. And handing you Plaintiff's Exhibit 65 for Identification, what is that?

A. Power of Attorney, naming John S. Moore, I. Allen Brown and E. F. Valikanje to act for Joe Palermo—rather [211] Bertha Palermo before the Treasury Department, received by me on November 30, 1955.

Q. And for what years were these Powers of Attorney concerned with as to their representation with the Internal Revenue Service? You can check on that.

A. The Power of Attorney received on November 30th, 1955, covers the years 1946 through 1954.

Q. Mr. Blankenship, are these Power of Attorneys received in connection with the case at issue here today?

A. Yes, sir.

Mr. Bantz: Do you want to see them?

Mr. Moore: Yes.

Mr. Bantz: Any objection? I am going to offer them in evidence.

Mr. Moore: I don't see the materiality of them, your Honor.

Mr. Bantz: Your Honor, I think I have some statements now that I received from counsel and he couldn't represent him unless he had a Power of Attorney, and I have a net worth statement and some other financial statements, and the only way I feel that I can put them in is through the power of attorney saying that they were authorized to

(Testimony of Donald M. Blankenship.)

turn them over to us, and that they are true and correct.

The Court: Well, for that purpose they will be admitted. It is the authority of counsel to act for the [212] defendant, is that correct?

Mr. Moore: Yes.

The Court: For that limited purpose they will be admitted.

(Whereupon, said Power of Attorneys were admitted in evidence as Plaintiff's Exhibits Nos. 61, 62, 63, 64, and 65.)

Q. Now, Mr. Blankenship, handing you Plaintiff's Exhibit 66 for Identification, would you state what that is?

A. It is a statement for Joe and Bertha Palermo called a "Net Worth Trace," 1949 through 1953.

Q. Where did you receive that, and how did you receive it?

A. I received it from Mr. Moore.

Q. Do you know when you received it?

A. Yes. My date—I dated it December 23, 1954.

Q. And does that concern the net worth of Joe Palermo in that? A. Yes.

Q. And what years does that cover?

A. It covers 1949, 1950, 1951, 1952 and 1953.

Q. I will hand you Plaintiff's Exhibit 67 for Identification. Will you examine that? What is that?

A. It is a statement for Joe and Bertha Palermo, White Salmon, Washington, "Differences

(Testimony of Donald M. Blankenship.)

Between Reported Income and Indicated Net Income, for the years '51, '52 and '53. [213]

Q. And where did you receive it from?

A. I received it from Mr. Moore.

Q. When?

A. At the same time, December 23, 1954.

Q. And both 66 and 67 exhibits were received in connection with the power of attorney that we have now in evidence? A. Yes, sir.

Q. Handing you Plaintiff's Exhibit 68 for Identification, would you please state what that is, if you know?

A. This is a "Statement of Profit and Loss" for Joe and Bertha Palermo, White Salmon, Washington, for the calendar years 1951, 1952 and 1953.

Q. All right; where did you receive it and when did you receive it?

A. I received it from Mr. Moore, December 17, 1954.

Q. When? A. December 17, 1954.

Q. And in what city did you receive it?

A. Yakima, Washington.

Q. And was that in connection with the power of attorney that the Internal Revenue Service had received?

A. At that time it was—Mr. Moore's power of attorney had been received.

Q. Who does it state is the paper that it is on?

A. It is on the stationery of Mickelwait and Brown, [214] Certified Public Accountants.

Q. Who is Mr. Brown?

(Testimony of Donald M. Blankenship.)

A. The C.P.A. in this case.

Q. And he is the gentleman sitting here?

A. Yes; sitting at the counsel table.

Q. And there was a power of attorney for Mr. Brown, was there? A. Yes.

Q. And handing you Plaintiff's Exhibit 69 for Identification, will you examine that and state what it is, if you know?

A. This is statement of deposits in the National Bank of Commerce, White Salmon, for Joe and Bertha Palermo, 1951, 1952 and 1953, and showing a comparison between the deposits per bank statements and deposits not in book, and sales not in the bank.

Q. When did you receive this one?

A. I received it on January 6, 1955.

Q. In connection with the power of attorney that is now in evidence? A. Yes, sir.

Q. Now, Mr. Blankenship, have 66, 67, 68 and 69 for Identification, have they been in the custody of either yourself or the Internal Revenue since you received them? A. Yes, sir.

Q. To your knowledge, have they been changed, altered, or in any manner changed from the time you got them? [215] A. No, sir.

Mr. Bantz: Your Honor, I am going to offer Plaintiff's Exhibits 66, 67, 68, and 69 for Identification into evidence.

Mr. Moore: May I ask one question, your Honor?

The Court: Yes; surely.

Mr. Moore: Plaintiff's Exhibits for Identifica-

(Testimony of Donald M. Blankenship.)

tion 66, 67, 68 and 69, Mr. Blankenship, were all delivered to you by me in connection with this case, is that correct? A. Yes, sir.

Mr. Moore: No objection.

The Court: They will be admitted.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits Nos. 66, 67, 68 and 69.)

Q. Handing you Plaintiff's Exhibits for Identification 70, 71, 72, 73, and 74, will you please examine each one of those and by number state what they are and what date they are concerned with?

A. Plaintiff's Exhibit 74—pardon me, Plaintiff's Exhibit 70 is a photostatic copy of the sales records of Joe Palermo for 1949.

Q. Where did you get that photostat?

A. They were given to me by Mr. Moore. [216]

Q. The photostats were? A. Yes, sir.

Q. And was that given to you in connection with the power of attorney that is now in evidence?

A. Yes, sir.

Q. All right; continue with 71.

A. Exhibit 71 is a sales record—copy of sales record for Joe Palermo for 1951 given to me by Mr. Moore.

Q. What year does that cover?

A. It covers the year 1950.

The Court: 1950?

A. 71 is '50.

The Court: Is 70 for '49?

(Testimony of Donald M. Blankenship.)

A. Yes, sir.

Q. Go ahead with 72.

A. 72 is a photostatic copy of sales records for 1951 given to me by Mr. Moore.

Q. Continue.

A. Exhibit 73 is photostatic copy of sales records for 1952 given to me by Mr. Moore, and 72 is photostatic copy of sales record of Mr. Palermo for 1953 given to me by Mr. Moore.

Q. Now, each of the Exhibits 70 through 74, inclusive, were given to you in connection with the power of attorney that is in evidence now, is that correct? A. Yes, sir. [217]

Q. Do you know where the originals are, Mr. Blankenship?

A. I believe they are in the courtroom.

Q. I mean, are they in your possession?

A. No, sir.

Q. Are they in possession of the Internal Revenue? A. No, sir.

Q. Do you have any way with which we can obtain the originals? A. No; not that I know.

Mr. Bantz: I think the Court will take judicial knowledge that the originals are with the defendant.

The Court: Well, we will wait and see if they will object to the offer when you offer them.

Mr. Bantz: I am going to offer 71, 72, 73, and 74, and I am not offering 70 at this time.

Mr. Moore: No objection.

The Court: They will be admitted. 71 through 74?

Mr. Bantz: Yes, your Honor.

(Testimony of Donald M. Blankenship.)

(Whereupon, said photostats were admitted in evidence as Plaintiff's Exhibits Nos. 71, 72, 73, and 74.)

Q. Mr. Blankenship, did you state how long you had been with the Internal Revenue Service?

A. Yes, sir. [218]

Q. How long was it; how long have you been with the Internal Revenue Service?

A. Well, the period is about six and a half years.

Q. Are you familiar with the requirements as to the filing of income tax returns in the United States?

A. Yes, sir.

Q. What are the requirements?

A. If any individual has a gross income of \$600.00 or more he is required to file a return.

Q. And where does he file the return?

A. He files the return in the district in which he resides or has his principal place of business.

Q. Now, what district is Bingen and White Salmon, Washington, in?

A. District of Washington.

Q. Does the District of Washington encompass the whole state?

A. Yes, sir.

Q. Mr. Blankenship, if an individual is married, how do they file or how can they file income tax returns?

A. There are two ways.

Q. What are the two ways?

A. In our state here you can either file joint or separate returns.

(Testimony of Donald M. Blankenship.)

Q. Well, when you say joint returns, what do you mean by that?

A. Both names appear on the return and both sign. [219]

Q. Man and wife?

A. Yes; husband and wife, that's right.

Q. Now, have you examined the income tax returns in this case which are Plaintiff's Exhibits 3, 4, and 5——

A. Yes, sir.

Q. Or, 3, 4, 5 and 6, I guess, they are?

A. Yes, sir.

Q. Have you examined those?

A. Yes, sir.

Q. Are those what you call joint returns?

A. Yes, sir.

Q. Now, what is the terminology, "Gross Income," what does it mean?

A. It generally means salary, wages, interest, dividends, gross receipts from the operation of the business if he is on a cash basis; gross profit from the operation of the business if you are on accrual.

Q. Gross profit now is what; state that again?

A. Gross Income?

Q. Yes.

A. That is it can include gross receipts from the business if you are on a cash basis, or the gross profit from the operation of the business if the taxpayer is on the accrual basis of accounting.

Q. Is it true that gross profit is gross income when? [220]

A. Yes, sir.

The Court: Are these returns all on a cash basis?

(Testimony of Donald M. Blankenship.)

Mr. Bantz: Yes.

The Court: If there is no dispute about that, if they are all on a cash basis I suggest you not confuse the jury on that by getting on the accrual.

Mr. Bantz: I was just trying to straighten it out for them.

Q. The returns, Mr. Blankenship, do you know if they are on accrual or cash basis?

A. Cash basis.

Q. Explain what does cash basis mean?

A. Generally it means that you will account for income when you receive it in cash and you claim expenses when you pay for those.

Q. And by cash you mean in any negotiable form? A. Yes.

Mr. Bantz: You may examine, Mr. Moore.

Cross-Examination

By Mr. Moore:

Q. Are Exhibits 66 through 69, 71 through 74 and Exhibit for Identification 70, all of the information that was provided to you in connection with the case by myself, Mr. Palermo and Mr. Brown?

A. I believe there are some depreciation [221] schedules.

Q. There were some depreciation schedules?

A. Yes. Reserve depreciation schedules and I believe a list of bank deposits, National Bank of Commerce of White Salmon.

Q. And you were granted the right to go over

(Testimony of Donald M. Blankenship.)

Mr. Palermo's books; you did go over Mr. Palermo's books? A. Yes, sir.

Q. And his cancelled checks and bank statements? A. Yes, sir.

Mr. Moore: May we approach the bench, your Honor?

The Court: All right.

Mr. Moore (With counsel at the bench out of hearing of the jury): This seems like a pretty good time, your Honor, if he rendered any reports in this case, in connection with this case, to make a demand to see their reports and then we can get into our discussion.

The Court: Suppose I just excuse the jury for recess.

Mr. Bantz: We are getting so speedily through this today and I have gone through ten witnesses today and I am wondering if we could finish up this argument. I have got three more witnesses which will take only maybe thirty minutes and then I would come back with Paul Simonson which would go through today.

The Court: I was going to recess at 4:00 o'clock today.

Mr. Bantz: We could have recess and then come back [222] and argue this motion and he can ask the question and I can object to it.

The Court: I don't think it is necessary for you to make demand in the presence of the jury. The court will take a ten-minute recess.

(Testimony of Donald M. Blankenship.)

(Whereupon, the following proceedings occurred after recess and in the absence of the jury.)

The Court: I think I may have misunderstood you, Mr. Moore, the reason I didn't excuse the jury for recess I thought you said that you wished to ask this witness, and I assume in the presence of the jury, if he had a report.

Mr. Moore: I don't think it is necessary, your Honor.

The Court: Well, then, I may as well excuse the jury.

(Whereupon, the following proceedings occurred in the presence of the jury.)

The Court: Now, ladies and gentlemen of the jury, we have reached a point in the trial where it will be necessary for the Court to hear the attorneys on some law points with which the jury is not concerned, and rather than keep you around here the rest of the afternoon—I think it will take the rest of the afternoon to take care of these matters—I think I will excuse you until tomorrow morning. The jury will be excused until tomorrow morning at 10:00 o'clock and you can return then.

(Whereupon, the following proceedings occurred in the absence of the jury.) [223]

The Court: All right, Mr. Moore.

Q. (By Mr. Moore): Mr. Blankenship, you testified before in connection with Exhibits 67 through

(Testimony of Donald M. Blankenship.)

59 and 71 through 74 and Exhibit for Identification No. 70, relating that those matters were submitted to you by me in connection with this case?

A. Yes.

Q. And that in addition you examined Mr. Palermo's tax returns, Exhibits 3, 4, 5, and 6, I believe it was, and that you had become acquainted with Mr. Palermo in connection with this case. Along that line, and as the same relates to this case, did you in the course of your employment for the Internal Revenue Service, submit written reports to your superiors in connection with your investigation which resulted in this case?

Mr. Bantz: Your Honor, I would object to him answering the question as being immaterial to the case in hand. But if there was some purpose in the inquiry as to impeachment or something that was said—the witness has only testified on direct examination as to records which were turned over to him in his possession by other counsel, not what was in the records, but just the naming off of them, and this witness not having testified to anything on direct examination concerning the case but except for the matters in evidence, I think that the questioning should be limited to the scope of the [224] direct examination, and it is certainly immaterial what he said in an inter-office communication to his superiors in any form unless the matter comes up in the form of evidence in the trial, either through direct evidence or through some exhibit that is put in.

(Testimony of Donald M. Blankenship.)

The Court: I think we might as well have him answer the question in the absence of the jury to find out whether he did make reports or not and decided whether that will be admitted.

Mr. Moore: All right; you may answer.

A. Yes; I did.

Q. And in the course of making those reports, that would have been during the period that you first began an examination into Mr. Palermo's income tax returns, is that correct? A. Yes, sir.

Q. And that was started when? A. 1954.

Q. In the Fall of 1954?

A. The first date would be September 28, 1954.

Q. And those reports that you submitted would have included references to the Exhibits 71, 72, 73, and 74, and Exhibit for Identification 70, all being the photostats of sales records; and also with reference to Exhibits 3, 4, 5, and 6, being the tax [225] returns? A. I don't—

Mr. Bantz: Just a minute. Your Honor, I don't understand the question. It appears to me that it is so broad that it couldn't be answered. He is starting out with the exhibits that he received from Mr. Moore and that goes back to the income tax returns themselves. Now, if he made a report concerning the income tax returns and found fault with the income tax returns that is a different matter, from the items that are in 66 through 70 and 71 through 74, those are just matters that were turned over to us; I mean that the defendant himself turned them over to us. Certainly there can be no inquiry as to

(Testimony of Donald M. Blankenship.)

those. It would have to be limited to something received from the defendant because we are applying Rule 16 and Rule 17 at the time of trial, along with the Jenks case in conjunction with the Browning case, and certainly they just have something that they gave to us and had the originals there. He is asking duplicate questions and they can't be answered.

The Court: I think that the purpose of Mr. Moore's question is to find out whether he made any reports, rather than for his opinion. He may answer.

A. Of course, my report makes reference to the income tax returns. As to the other exhibits, I don't think so. I am not sure. I don't think so. I am not sure that would be a sales record if my exhibit numbers are correct. [226]

Q. Yes; 71 through 74.

A. I don't recall making any specific references to that—to those sales records.

The Court: Let me see, Mr. Blankenship. I think you said in your direct examination here that you were an Agent of the Bureau of Internal Revenue?

A. Yes.

The Court: And were you working at the time out of the Tacoma office?

A. Out of the Yakima office.

The Court: Yakima office here?

A. Yes.

The Court: To whom did you make these reports?

(Testimony of Donald M. Blankenship.)

A. I made them first to my group supervisor.

The Court: Where is your group supervisor?

A. In Seattle, Washington.

The Court: I see. Where were you stationed at the time of the work?

A. In Yakima.

The Court: In Yakima, and you were doing the work around White Salmon and Bingen?

A. Yes.

The Court: Did you have a superior in the Yakima office?

A. No; I didn't. [227]

The Court: You were alone here at your office?

A. Yes.

The Court: Working alone?

A. Yes.

The Court: And who was your immediate superior then?

A. At that time and still is Mr. E. P. Hunt.

The Court: In the Seattle office of the Bureau of Internal Revenue?

A. Yes.

The Court: Is that where you were making these communications and reports?

A. Yes, sir.

The Court: Is that in the nature of a communication from the Yakima office to the Seattle office of the Bureau?

A. Yes; it was from me as an Agent to my supervisor.

(Testimony of Donald M. Blankenship.)

The Court: Were you working under the direct supervision of anybody?

A. Only from the supervisor in Seattle.

The Court: The supervisor in Seattle?

A. Yes.

The Court: And that is where these reports went?

A. Yes.

The Court: And those reports covered all of your activities, I suppose, in connection with the case as the case progressed? [228]

A. Yes.

The Court: Were the documents that you obtained here, as you testified, and have been admitted in evidence now, were they transmitted to the Seattle office as you received them?

A. No, your Honor.

The Court: What did you do with them?

A. I retained them in my file.

The Court: You kept them here?

A. Yes.

The Court: Do you have any further questions, Mr. Moore?

Mr. Moore: I thought I might ask along another line, your Honor, in order to possibly clarify the situation so that we can get it out of the way this afternoon.

The Court: All right.

Q. (By Mr. Moore): In line with this investigation, Mr. Blankenship, after September, 1954, you worked with Mr. Paul Simonson also, did you not?

(Testimony of Donald M. Blankenship.)

A. Yes.

Q. In investigating Mr. Palermo and his tax returns? A. Yes; I did.

Q. And the investigation continued thereafter with you and Mr. Simonson working together?

A. Yes, sir. [229]

Q. And in the course of that investigation both you and Mr. Simonson would render reports at either regular or irregular times to your superiors in the Internal Revenue Service in Seattle?

A. Only at the conclusion did I render a report, except perhaps maybe an oral statement.

Q. And to your knowledge did Mr. Simonson render written reports to the Seattle office on more than one occasion? A. Pardon me?

Q. On more than one occasion?

A. To my knowledge, no.

Q. The reports that were written by you and Mr. Simonson were based upon your investigations from the Fall of 1954 until your active investigation had terminated? A. Yes, sir.

Q. And this case is to a certain extent the result of investigation conducted by you and Mr. Simonson? A. Yes, sir.

Q. Did you see the report or reports which Mr. Simonson submitted?

Mr. Bantz: Your Honor, I would object to that anyway as being immaterial whether he saw them or not.

The Court: Yes; I will sustain the objection.

Q. Did you collaborate with Mr. Simonson in

(Testimony of Donald M. Blankenship.)

the creation of his report or reports to his [230] superiors?

A. Well, what he did with it after he transmitted it to them I don't know. We fully discussed items back and forth, yes.

Q. Do you mean you gave him information?

A. Well, information that we gathered jointly, I would say. We did work, oh, I mean on things and discuss things back and forth that we dug up.

Q. Did those reports of you and Mr. Simonson contain facts found by you and Mr. Simonson in your investigation as to income of Mr. Palermo and expenses of Mr. Palermo in the operation of his business during the years '50 through '53?

Mr. Bantz: Just a minute. I would object there, your Honor, unless there is some showing that we are not producing at the time of trial any information as to his income that we have or expenses that we have. Certainly he is going beyond this witness' direct examination on any testimony he could give in this particular case. He is asking now to find out what our testimony is before the man has testified to anything in the trial, if he would be eligible to testify to it.

The Court: I am not sure that I understand Mr. Moore's question. He says: Does your report contain facts? It is hard to see how an investigative agent's report would not contain facts and records or the investigative agent's [231] report of what he had heard or what somebody else has told him or what some witness has testified.

(Testimony of Donald M. Blankenship.)

Mr. Moore: Yes.

The Court: I don't think you are permitted to go that far.

Mr. Moore: I will advise the Court that one of the reasons for asking questions along this line was that I was trying to form the basis at this time in relation to Mr. Simonson's testimony so that we won't have to take it up in the morning.

The Court: Oh, I see. The view that I have taken may be wrong, but I have reached the conclusion, as I told counsel in the Chambers as to the Jenks case, that the defense goes no further, after the witness takes the stand and after it is made to appear that he had made reports concerning the subject matter of his testimony, that they have the right to demand statements that he has made or reports that he has made, but I think also there should be added: If they are requested in good faith for use in the cross-examination of the witness to effect his credibility. Now, in this particular instance I can't believe that the Supreme Court in the Jenks case meant that if the Government puts on an investigative witness and has him testify to the time of day, we will say, or has him testify that he saw the defendant on a certain day, that does not mean that they can turn the witness [232] inside out and get a history of the case and use the reports and say: Here is what we are going to prove and we know exactly what the Government's case is. You cannot get the entire case laid out on the reports of the investigative witness, and if he testifies to

(Testimony of Donald M. Blankenship.)

one thing and one document, then to get the whole Government's case laid out. I don't think that can be done. It must be something that is demanded in good faith and can be used in cross-examination. Here there is nothing to cross-examine on except the admissibility of a few documents that have not yet been offered. Here he has testified as to the documents and what is necessary to file joint returns and what is not, and I can't see that some reports he has made in inter-office communications would be admissible.

Of course, the big problem of the Trial Judges on the benches from time to time and the Appellate Courts is just what the Supreme Court meant and how far they intended to go in the Jenks case. And, of course, they had not agents of the Government but undercover investigators that had been planted by the Government in subversive organizations and Communist organizations, and it was their reports that we are concerned with there. Now, whether that means any Government agent who is employed full time or on a regular basis like the F.B.I. Agents or like an agent in the Internal Revenue Service, if they get on the stand, that they should disgorge [233] all the documents. I don't think you can go that far.

Mr. Moore: Your Honor, I don't want to go that far myself. I was hoping by examining Mr. Blankenship and being aware of what Mr. Simonson is going to testify to tomorrow, I thought we could get this out of the way. I wanted to bring this out.

(Testimony of Donald M. Blankenship.)

The Court: Mr. Simonson is here?

Mr. Bantz: Yes; he is the man sitting behind me here, and Mr. Simonson is an Intelligence Agent who does accounting work in the preparation of these cases. It starts with the Agent that is on the stand and he examines the books and consults with Mr. Simonson and Mr. Simonson takes the case over and it goes from there.

The Court: Yes; I understand that distinction.

Mr. Moore: Maybe we will have to just let it go until Mr. Simonson takes the stand.

The Court: It seems to me that this wasn't just the right witness to try it out on; he hasn't testified to much except documents.

Mr. Moore: I thought we could work it out this afternoon.

Mr. Bantz: Of course, my objection to—your Honor, if I may have a minute here?

The Court: Yes; surely.

Mr. Bantz: As to tomorrow, I am going to put on Mr. [234] Simonson on, who undoubtedly knows much about the case, and I must keep his examination within the bounds of the case. He can't testify as to his summary of the evidence that isn't here in court. You wouldn't allow me for a minute unless it is something within some of the issues that have been admitted, and you are not going to allow me to do it, and so, unless he testifies—I want to state my position today so that Mr. Moore will know it, if he testifies basically 100 per cent on the facts that are here so that the jury is given a summary of

(Testimony of Donald B. Blankenship.)

what went on, certainly it doesn't open the door as to what did you do in 1954 about this case. If I don't cover it on direct examination, I don't think that his files should be open. I am not trying to belittle the motion when they have good cause to make it but I strenuously object unless they show some good cause.

The Court: Of course, the difficulty about passing upon applications for disclosure, I think it is unfair for the Government, because it can't be reciprocal, to make the Government make an undue disclosure during the trial or during the progress of the trial on communications and evidence back and forth as to inter-office communications. Of course, if a witness takes the stand whether he is an expert on evidence or whatever he is, if he has made prior statements or reports that might be inconsistent with his present testimony, that would be useful for the defense obviously in [235] the matter of cross-examination and in the attempted impeachment of the witness. Of course, I think one of the big subjects for discussion and covering quite a bit of the opinion in the Jenks case was whether or not someone else other than the defense counsel should determine whether or not the prior statements were contradictory or inconsistent and the court there said that the United States Attorney and not even the Court can say that these reports or prior statements are not inconsistent, and if the effort is a good faith one and it is an evidentiary matter that they are seeking to get—would be evidentiary in the

(Testimony of Donald B. Blankenship.)

matter of cross-examination, then I think they are entitled to determine whether it would be contradictory. Of course, if the witness has testified on direct examination, the matter of premature disclosure is not present. I don't know how many witnesses you would have after—Mr. Simonson, is it?

Mr. Bantz: Yes; Mr. Simonson.

The Court: I don't know how many witnesses you would have after Mr. Simonson but you have already disclosed what you are going to prove by him, and I can't see where there would be very much detriment or unfairness of his disclosure of the reports. It does not mean that the defense can bring in all the evidence that is contained in Mr. Simonson's reports. I think he has the privilege of looking over it and then by proper cross-examination bring it out. I may not let [236] him use any of it and he has the right to determine whether it is inconsistent and can be used on cross-examination, and then it is finally for the Court to determine whether or not it is proper cross-examination upon proper objection. I suppose you understand that you can't get in everything that he shows in his report.

Mr. Moore: I think, your Honor, we have accomplished this much; I think when Mr. Simonson gets on the stand or Mr. Blankenship testifies further we can make the request without any further argument. We at least have the expression of how the Court is going to rule on it.

The Court: I don't think I want to cut Mr. Bantz off from expressing his views. I think that the De-

Testimony of Donald B. Blankenship.)

Department of Justice has given this considerable consideration. I don't think that it is a new matter as far as the Department of Justice is concerned.

Mr. Bantz: I am going to follow along the lines of what he testifies to; if he testified he has made a prior statement, we will not argue about that. I think we do not want to go beyond what he has testified to.

The Court: I think it should be confined to reports he has made and that are pertinent to the testimony, with the matters concerning which he has testified.

Mr. Bantz: Yes.

Mr. Moore: Yes. [237]

The Court: Where he has testified to reports and where he has got something that has nothing in the world to do with this, I don't think counsel is entitled to that. It must be something that pertains to his testimony on the stand here, and then counsel is entitled and has a right to look it over and see whether prior statements are inconsistent, and I think that is what the court said in the Jenks case.

Mr. Moore: That is the way I understood it. Thank you, your Honor.

Mr. Bantz: Thank you, your Honor.

The Court: The Clerk tells me that you have in mind making photostats of certain of the exhibits here. I think that counsel can arrange among yourselves and with the Clerk to have them taken out and photostated.

(Testimony of Donald B. Blankenship.)

Mr. Moore: By agreement with the Court and counsel I won't cross-examine Mr. Blankenship until the jury gets back.

The Court: All right; the court will adjourn until tomorrow morning at 10:00 o'clock.

July 25, 1957—10:02 A.M.

The Court: All right; proceed.

Mr. Bantz: I think that the record should show that Mr. Blankenship was on the stand last. Mr. Moore says he has no further examination and I have no further examination. [238]

The Court: I see. Yes; he was on the stand when the jury was excused.

Mr. Bantz: Yes. I will call Mr. Nickols.

CECIL NICKOLS

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. Cecil Nickols.

Q. Just sit down. You can sit down, Mr. Nickols.

What is it now? A. Cecil Nickols.

Q. And where do you live, Mr. Nickols?

A. White Salmon.

Q. And how long have you resided in that area?

A. Since 1904.

(Testimony of Cecil Nickols.)

Q. Yes; all right. And in what business are you engaged?

A. I am in the fishing business now.

Q. In 1950 to 1953 what business were you engaged in?

A. Sawmill business.

Q. And where was that sawmill business located?

A. In the White Salmon area, West Klickitat County.

Q. Are you familiar with a man named Joe Palermo? [239]

A. Yes; I know him.

Q. Do you know him personally?

A. Yes.

Q. Is he in the court room?

A. Yes.

Q. Will you point him out?

A. He is the second gentleman on the right-hand table.

Q. Mr. Nickols, were you issued a subpoena to bring some records here in court?

A. Yes.

Q. Do you have them with you?

A. Yes.

Q. Let us—may I have them, please? You can just sit there.

The Clerk: Plaintiff's 75 and 76.

Q. Handing you Plaintiff's Exhibit 75 for Identification, Mr. Nickols, these are some items you just handed me. Now, what is that exhibit there?

A. It is a check to Mr. Palermo for stumpage.

Q. All right; is it more than one check?

A. There is three checks here.

Q. What year does it cover?

A. It covers October 13th.

Q. Of what year?

A. 1951.

(Testimony of Cecil Nickols.)

Q. And the other checks, what year do they cover? [240]

A. November 6th, 1951, and November 29th, '51.

Q. And what were these checks for?

A. For stumpage.

Q. All right, and they are all to Mr. Palermo?

A. Yes.

Q. Handing you Exhibit 76 for Identification, those are some items that you just handed me, and state just what those are, please.

A. Well, these are checks for stumpage.

Q. For what year now is that group of checks?

A. For '52.

Q. And are they all to Mr. Palermo?

A. Yes; these are to Mr. Palermo.

Q. Now, is your signature on these checks?

A. They are my wife's.

Q. Do you recognize your wife's signature?

A. Absolutely.

Q. All right; were they in the course of business?

A. Yes; they were in the course of business.

Q. All right. Plaintiff's Exhibit 76 for Identification, what were these checks for?

A. They were for stumpage.

Q. And to Mr. Palermo?

A. Yes, to Mr. Palermo.

Q. Now, Mr. Nickols, do you know if you have any other or [241] additional checks to Mr. Palermo for logs or stumpage?

A. No; I have not.

Testimony of Cecil Nickols.)

Q. You checked your records?

A. I checked my records. I have no more.

Mr. Bantz: I will offer Plaintiff's 75 and 76 in evidence, your Honor.

Mr. Moore: No objection.

The Court: Admitted.

(Whereupon, said groups of checks were admitted in evidence as Plaintiff's Exhibits 75 and 76.)

Mr. Bantz: You may examine.

Cross-Examination

By Mr. Moore:

Q. Were you, you say, in the sawmill business from 1950 to 1953? A. Yes.

Q. And you did business with Mr. Palermo only in 1951 and 1952? A. That's right.

Q. Was the termination of your business relationship the result of some difficulty between the two of you?

A. No. No. I got excessive timber otherwise.

Q. Pardon? [242]

A. I got excessive timber otherwise than Mr. Palermo's timber.

Q. There were no difficulties between you?

A. No. No; our business relationships were fine. There were no difficulties whatever.

Q. Were you in the logging business before 1950?

A. Oh, yes; I have been in the logging business since 1949.

Mr. Moore: That is all.

The Court: Any other questions?

Mr. Bantz: No.

(Witness excused.)

Mr. Bantz: Call Mr. Everett Thoren.

EVERETT THOREN

called and affirmed as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Would you state your name, please?

A. Everett Thoren.

Q. And where do you reside, Mr. Thoren?

A. I am living at Lyle, Washington, now.

Q. What business are you engaged in?

A. In the lumber business.

Q. And what firm is that? [243]

A. We are known as Thoren Lumber Company now.

Q. And are you one of the owners?

A. Yes; I am one of the owners.

Q. Now, are you familiar with the Lyle Lumber Company?

A. Yes; I am familiar with that company.

Q. What connection did you have with the Lyle Lumber Company?

A. We did planing work for them for a number of years, and in 1953 we received the assets of the Lyle Lumber Company into our firm.

(Testimony of Everett Thoren.)

Q. Now, when you received the assets, did you get the books and records of the Lyle Lumber Company?

A. Yes; they gave me everything that was there on the premises.

Q. Including books and records?

A. That's right.

Q. And have you had those books and records under your custody and control since that time?

A. Yes; they are in the boxes ever since that time.

Q. And what is your position with the Thoren Lumber Company at the present time?

A. Well, I am presently the owner and manager.

Q. Now, were you subpoenaed to bring all of the records into court?

A. Yes; I was.

Q. And do you know Mr. Joe Palermo? [244]

A. Yes.

Q. Is he in the courtroom?

A. Yes, he is.

Mr. Bantz: May I have these marked as exhibits, please?

The Clerk: Plaintiff's 77, 78, 79.

Q. Mr. Thoren, handing you Plaintiff's Exhibit 77 for Identification, which is one of the items you just handed me, would you examine that? Now, what do those purport to be?

A. Well, this is a check, a Lyle Lumber Company check made out to Joe Palermo, signed by Fred Ross, in the amount of \$3,600.52.

Q. What is the date of that check?

A. May 18, 1948.

(Testimony of Everett Thoren.)

Q. Now, there is another one there.

A. That is made out to Joe Palermo and the amount is different, and——

The Court: If there is no objection you really should not give the contents of the checks until they have been admitted.

Mr. Bantz: I am sorry. I am just trying to get along.

Q. Did you receive these checks along with the other records of the Lyle Lumber Company?

A. Yes; these are the checks.

Q. And those have been in your custody? [245]

A. They have been in my custody.

The Court: He can state who they are to and what they are for.

Q. Plaintiff's 78 for Identification, will you just state, if you know, what those are?

A. Those are Lyle Lumber Company checks made out to Joe Palermo. May 31, 1949——

Q. Now, are those all for the same year, the checks? A. Yes; they are all for 1949.

Q. What business was the Lyle Lumber Company in?

A. They had a sawmill for manufacturing logs into lumber.

Q. Do you know what these are for?

A. Those are apparently log checks.

Q. Now, handing you Plaintiff's Exhibit 79 for Identification, would you please examine that and would you state what it is?

(Testimony of Everett Thoren.)

A. This is a log ledger showing a summary of the logs purchased by Lyle Lumber Company.

Q. By Lyle Lumber Company? A. Yes.

Q. All right. Now, in that Plaintiff's 79 is there any reference to Joe Palermo?

A. On Page 15 there is—it shows logs, Joe Palermo, April 30th to May 15th.

Q. All right. Now, there are other references in that book [246] that you have also clipped in there, is that right?

A. On Page 20 there is a reference to logs purchased from Joe Palermo for May 16th to the 31st.

Q. I am just wanting to know what was in there. Did you check, Mr. Thoren, whether Exhibits 77 and 78 are also contained in—I mean that the figures and information that details the checks is contained in Exhibit 79 for Identification?

A. I checked some of them.

Q. And how did they compare? Are they included?

A. As near as I can tell for the same amounts.

Q. And what is a book like that called?

A. Well, it says "Record" on here.

Q. Well, you are in the logging or milling business; what is that called?

A. Well, we would call it an account book, log account book.

Q. For logs purchased?

A. Yes, for logs purchased from different loggers, yes.

Q. Did you in your records that you have in

(Testimony of Everett Thoren.)

your possession find any additional matter concerning Joe Palermo, checks or other books or records?

A. I never looked for them.

Q. Those are the years you were asked for?

A. That's right.

Q. When did the Lyle Lumber Company go out of business? [247]

A. We took over the assets of the Lyle Lumber Company, I believe, January 13, 1953.

Mr. Bantz: You may examine.

Cross-Examination

By Mr. Moore:

Q. Did you used to work for the Lyle Lumber Company?

A. We did their milling on a custom milling basis from 1948 for—I believe it was right up until 1950, some time in there.

Q. And your knowledge of Exhibits for Identification 77, 78 and 79 is by reason of having found those matters in your record books?

A. That's right. We never paid too much attention to those records until they were showed to us. In fact, they were all in a box over there, that is the way they were given to us.

Q. And have you done business with Mr. Palermo since you took over the Lyle Lumber Company?

A. Yes. Yes; we have bought logs from Mr. Palermo.

Mr. Moore: I think that is all.

Mr. Bantz: You may be excused.

(Witness excused.)

Mr. Schmid, please. [248]

DAN SCHMID

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. Dan Schmid.

Q. And where do you reside, Mr. Schmid?

A. Stevenson, Washington.

Q. In what business are you engaged?

A. At the present time I am working for Hege-
wald Company, that is in Stevenson, Washington.

Q. Mr. Schmid, have you ever been connected
with the Stevenson Plywood Corporation?

A. Yes, sir.

Q. When were you connected with them?

A. I was connected with them from July, 1948,
until April, 1956.

Q. All right. What was your position with that
corporation? A. Office manager.

Q. As officer, manager were you familiar with
the books and records of the Stevenson Plywood
Corporation? A. Yes, sir, I was.

Q. Mr. Schmid, are you familiar, or do you
know a man by the name of Joe Palermo?

(Testimony of Dan Schmid.)

A. I have met Mr. Palermo. [249]

Q. And do you know if the Stevenson Plywood Corporation had any business with him?

A. Yes, they did.

Q. And, now, were you subpoenaed to bring certain books and records with you? A. Yes, sir.

Q. In connection with Joe Palermo?

A. Yes, sir.

Q. And did you bring them with you?

A. Yes.

Q. May I have them, please?

A. It is just this top envelope. These others are empty.

The Clerk: Marking Plaintiff's 80, 81, 82, 83, 84.

Q. Mr. Schmid, handing you Plaintiff's Exhibit 80 for Identification, are these a part of the records now that you brought with you? A. Yes.

Q. In connection with the subpoena?

A. Yes.

Q. Now, would you just tell the jury what are those?

A. Well, these are—this is the detail and the checks for logs that were purchased from Palermo.

Q. And who are they to?

A. Made payable to Mr. Joe Palermo.

The Court: Keep your voice up, please. [250]

A. Made payable to Mr. Joe Palermo.

The Court: Yes, tell the jury so that they can hear.

Q. What years were they concerning?

A. Years 1949 through 1953.

(Testimony of Dan Schmid.)

Q. No, the ones that you have in your hand, Plaintiff's 80, what year are they? A. 1949.

Q. And there are some other sheets besides the checks? A. That is the detail.

Q. The detail is concerned with the checks that they are attached to? A. Yes, that's right.

Q. Did you check during the year 1949, did you check to see if that is all the records you had in connection with Mr. Palermo? A. Yes.

Q. And is that all the records you could find?

A. Yes.

Q. Handing you Plaintiff's Exhibit 81 for Identification, would you please examine that and tell the Court and jury what it is, if you know? As a group, you don't have to go over each one.

A. This represents payment for logs we purchased from Mr. Palermo during the year 1950.

Q. And they are for the Stevenson Plywood Corporation? [251] A. That is correct.

Q. Now, are they all for one year?

A. These are all for one year.

Q. And did you check your records to see if you had any other checks or supporting vouchers concerning the year 1950? A. For Mr. Palermo?

Q. Yes, for Mr. Palermo.

A. I have checked and this is all that I could find, and I am sure that these is all that there were.

Q. And you recognize these checks as being checks on the Stevenson Plywood Corporation?

A. Yes.

Q. And what are the checks for?

(Testimony of Dan Schmid.)

A. They were for logs purchased from Mr. Palermo.

Mr. Bantz: I will offer Identification No. 81 in evidence, Your Honor.

Mr. Moore: No objection.

The Court: Admitted.

(Whereupon, said group of checks were admitted in evidence as Plaintiff's Exhibit No. 81.)

Q. Handing you Plaintiff's Exhibit 82 for Identification, would you please examine that [252] exhibit? A. Yes.

Q. All right, now, for what year is Plaintiff's Exhibit 82 for Identification concerned with?

A. For the year 1951.

Q. And who are the checks made payable to?

A. Mr. Joe Palermo.

Q. And would your testimony as to Plaintiff's 82 be the same as the one you have just testified for the year 1950, which is Plaintiff's Exhibit 81?

A. Yes.

Q. You recognize all these and recognize what these matters are? A. Yes, I do.

Mr. Bantz: I will offer Plaintiff's 82 in evidence, Your Honor.

Mr. Moore: No objection.

The Court: Admitted.

(Whereupon, said group of checks was admitted in evidence as Plaintiff's Exhibit No. 82.)

(Testimony of Dan Schmid.)

Q. Handing you Plaintiff's Exhibit 83 for Identification, would you please examine that exhibit?

A. Yes.

Q. That is part of the records you brought with you this [253] morning? A. Yes, sir.

Q. And what year is that exhibit concerned with? A. 1952.

Q. Did you check the records to see if there was any other checks or supporting vouchers concerning Joe Palermo for the year 1952 with the Stevenson Plywood Corporation? A. I did.

Q. Could you find any additional ones?

A. No.

Q. And would your testimony as to Plaintiff's 83 concerning the year 1952 be the same for the years 1950 and 1951 which you have just testified about? A. Yes.

Q. Now, handing you Plaintiff's Identification 84, what is that?

A. That covers the year 1953.

Q. Are those from your corporation?

A. Yes.

Q. Do you recognize them? A. Yes.

Q. And who are they made payable to?

A. Mr. Joe Palermo.

Q. And would your testimony, concerning 1953, concerning Plaintiff's 84 be the same as it was concerning Plaintiff's [254] 83, concerning 1952?

A. Yes.

Q. Did you find any additional checks made payable to Mr. Joe Palermo during the year 1953?

(Testimony of Dan Schmid.)

A. No.

Mr. Bantz: I will offer Plaintiff's 83 and 84, Your Honor.

Mr. Moore: No objection, Your Honor.

The Court: Admitted.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibit Nos. 83 and 84.)

Q. Mr. Schmid, discussing or referring now to the Plaintiff's Exhibits 81, 82, 83, and 84, which I just handed to you and you identified, would you please state what all of those checks in there were payable to Mr. Palermo for?

A. For logs that were purchased from Mr. Palermo.

Q. Now, did your company do any other type business with Mr. Palermo? A. No.

Mr. Bantz: You may examine.

Cross-Examination

By Mr. Moore:

Q. How was delivery of the checks to Mr. Palermo effected? [255]

A. I can't tell you. Some loggers picked their checks up and others were mailed out. We had as many as 200 loggers in there at the time.

Q. I beg your pardon?

A. We had as many as 200 loggers in there in different years.

Mr. Moore: That is all.

Mr. Bantz: You may be excused.

(Witness excused.)

Mr. Bantz: Your Honor, at this time I would like to request about fifteen to twenty minutes recess for us. The next witness is Mr. Paul Simonson and I have to have him examine some of the records that have just been put in this morning so that he can testify to them. I want to have the witness check them before we continue and if you would not object it would save us time.

The Court: I will just recess subject to call, if you will let me know.

(Whereupon, after recess the following proceedings occurred:)

PAUL SIMONSON

called and sworn as a witness on behalf of the Government, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Now, will you state your name, please? [256]

A. Paul Simonson.

Q. And where do you live, Mr. Simonson?

A. Yakima, Washington.

Q. And how long have you lived here?

A. Since 1954.

Q. Now, what position are you occupied with at the present time?

(Testimony of Paul Simonson.)

A. I am a Special Agent with the Internal Revenue Service.

Q. And how long have you been with the Internal Revenue Service?

A. Since September, 1948.

Q. And what does a Special Agent with the Internal Revenue Service do; what are your duties?

A. One of our duties is to make income tax investigations where fraud is alleged.

Q. Now, where did you go to college, Mr. Simonson?

A. Michigan State College and Seattle University.

Q. And what subjects—what did you major in at school? A. Accounting.

Q. And are you an accountant?

A. Yes, sir, I am.

Q. And have you passed the Certified Public Accountant's Examination? A. I have.

Q. And when did you become a C. P. A.? [257]

A. In 1950.

Q. And you are still an active C. P. A.?

A. I am not in active practice.

Q. No. I mean you are still a licensed C. P. A.?

A. Yes.

Q. Mr. Simonson, are you familiar with the case of United States vs. Joe Palermo?

A. Yes, I am.

Q. And what position did you have in relation to that case?

(Testimony of Paul Simonson.)

A. I was a Special Agent for the Internal Revenue Service investigating Joe Palermo.

Q. Now, do you recall when you were first assigned to this case? A. December 14, 1954.

Q. And were you then a resident of Seattle or here?

A. I was a resident of Yakima at that time.

Q. And where were you employed by the Internal Revenue prior to your tour at Yakima?

A. At Seattle, Washington.

Q. What were you doing at Seattle?

A. I was a Special Agent in Seattle.

Q. Have you always been a Special Agent with the Internal Revenue? A. I have, yes.

Q. Now, do you know Mr. Joe Palermo? [258]

A. I do.

Q. You have met him, have you?

A. Yes, I have.

Q. You conducted your portion of the investigation of this case, I take it? A. I did, yes.

Q. Now, did you have, that is in the past did you have a meeting with Mr. Palermo in which you inspected any records of any kind?

A. Yes, I did.

Q. When was that, and where was that?

A. The first meeting I had with Mr. Palermo was December 28th, 1954, at Goldendale, Washington, in the Internal Revenue office there.

Q. And who was present at that meeting?

A. Mrs. Palermo, Mr. Palermo, Mr. Moore, Mr. Brown. Mr. Blankenship and myself.

(Testimony of Paul Simonson.)

Q. Now, did you inspect any records of Mr. Palermo at that time?

A. We looked at his books. He had them present.

Q. What do you mean by books?

A. The books where he recorded his receipts from the logging business and other information included in his books.

Q. And what years were involved that you were looking at, at that time? [259]

A. I don't recall what the years were we had at that particular meeting but we did have his books covering at least a portion of the years we were checking.

Q. Now, did you have any other occasion to examine the books and records of Mr. Palermo?

A. I did, yes, sir.

Q. Where and when was that?

A. I examined the books in Mr. Moore's office here at Yakima, during the year 1955 and about in June, 1955, there was several days in June I examined those books and later I recall I did not have 1948 books which he did not have there at one time but he did bring those up and I examined those later.

Q. Now, you have then examined the books and records from the year 1948 through the indictment years of 1950, through 1953? A. I have.

Q. And did you make yourself a schedule at that time of what was included in the books and records?

A. No, I did not. Mr. Moore furnished Mr.

(Testimony of Paul Simonson.)

Blankenship with photostats of the records so far as gross receipts are concerned and I examined the books in Mr. Moore's office.

Q. Now, have you examined the photostatic copies of books and records given to Mr. Blankenship? A. I have. [260]

Q. And those are the photostats—some of those photostats are now in evidence, is that correct?

A. That is correct.

Q. Do you have in your possession one of those photostats that was given to you?

A. There is one that was given for the year 1948.

Q. And do you have that with you?

A. No, I don't have that with me.

Q. Or do I have that?

A. I don't have it. You have it.

Q. I have it? A. Yes.

Mr. Bantz: Would you mark this for identification?

The Clerk: Plaintiff's 85.

Q. Mr. Simonson, handing you Plaintiff's 85, would you examine that and tell me if you have seen it before and when?

A. I have, and this is a photostat of a record which was given to me by Mr. Moore.

Q. When did you receive it?

A. On September 14th, 1955.

Q. What is it alleged to be, or purported to be?

A. It is a record for receipts for 1948 for Joe Palermo and also includes receipts for '47.

Q. Mr. Simonson, have you had a chance to ex-

(Testimony of Paul Simonson.)

amine the books [261] and records of Mr. Palermo as to the year of 1950? A. Yes, I have.

Q. And you did that through your meetings with him and the exhibits that are now in evidence?

A. Yes.

Q. Did you have a chance to examine the bank records involving the deposits of Mr. Palermo in the National Bank of Commerce at White Salmon?

A. Yes, I did.

Q. And when was that?

A. We examined the deposits in the National Bank of Commerce on March 9th and 10th of 1955.

Q. And are those bank deposit ledgers in evidence now? A. They are.

Q. And have you examined them?

A. Yes, I have.

Q. They are one and the same? A. Yes.

Q. Did you have an opportunity to examine the records of the bank in Stevenson for the year of 1950? A. I did.

Q. And do you recall when that was?

A. It was about March 10th or 11th or in that period of time.

Q. And are those records in evidence now?

A. Yes, they are. [262]

Mr. Bantz: May I have Plaintiff's Exhibits 26 through 30, please, Mr. Taylor. May I have Exhibits 71 through 74?

Q. Mr. Simonson, handing you Plaintiff's Exhibit 71, have you seen that before?

A. Yes, I have.

(Testimony of Paul Simonson.)

Q. And what is that now?

A. That is a photostatic copy of Joe Palermo's receipts for the year 1951.

Q. For 1951?

A. I mean—I am sorry, I mean 1950.

The Court: What number is that?

Mr. Bantz: That is Plaintiff's Exhibit 71, Your Honor.

The Court: All right.

Q. Now, handing you Plaintiff's Exhibit 27 for Identification, have you had an opportunity to examine that exhibit? A. Yes, I have.

Mr. Bantz: And, Mr. Taylor, would you clip that in there, that loose piece of paper?

Q. Have you had a chance to examine this Plaintiff's exhibit? A. Yes, I have.

Q. And have you checked that exhibit for identification in connection with Plaintiff's Exhibit 71 that you have in your hand? A. Yes, I have.

Mr. Bantz: All right. May I have, Mr. Taylor, plaintiff's [263] Exhibits 3, 4, 5, and 6.

Q. Now, handing you Plaintiff's Exhibit 3, which is the 1950 income tax return of Mr. Palermo, will you just look at that again. Have you had a chance to examine that previously?

A. Yes, I have.

Q. Now, Mr. Simonson, have you ever checked the figures on Plaintiff's Exhibit 71 and Plaintiff's Exhibit 27 for Identification and Plaintiff's Exhibit 3, which is the 1950 income tax return of Mr. Palermo, against each other?

(Testimony of Paul Simonson.)

A. Yes, I have.

Q. Just tell me what is the relationship of Plaintiff's Exhibit 27 for Identification to 71 and 3 that have been admitted?

Mr. Moore: Your Honor, I don't think that is proper examination for the witness to tell or testify as to the contents of an identification that——

Mr. Bantz: I am trying to get it admitted on the relationship, that is what I am trying to do.

The Court: I think what counsel is asking him, as an accounting expert what from the standpoint of accounting and record keeping is the relation between them. Is that it?

Mr. Bantz: Yes; that is right.

Mr. Moore: I thought he was going to testify as to accounting. [264]

The Court: The relationship between them.

Mr. Bantz: Yes, the relationship between them.

A. The Exhibit 27 is work papers of R. J. Bates used in the preparation of the income tax return which is Plaintiff's Exhibit 3.

Q. And what is the relation of 71 to 27 for Identification?

A. Exhibit 71 is Mr. Palermo's receipt record which were the figures which were obtained to be put on Exhibit 27 being the work papers and also Exhibit 3.

Q. Do the work papers and Exhibit 71 for all practical purposes have the same figures?

A. The total of the receipts of 71 agree on the work papers and on the income tax return.

(Testimony of Paul Simonson.)

Mr. Bantz: Now, Your Honor, at this time I am going to offer Plaintiff's Exhibit 27 for Identification, which was identified by Mr. Bates previously.

Mr. Moore: Now, Your Honor, I frankly don't believe that Plaintiff's Exhibit 27 for Identification has been properly identified. The witness has testified that these are the work papers of Mr. Bates but I don't think that we know that they are all work papers that were used by Mr. Bates because Mr. Bates couldn't tell us, nor could his son. The papers to all intents and purposes have only been identified as being papers upon which the year 1950 was written and which Mr. Bates' son said contained his father's handwriting [265] and somebody else's handwriting.

The Court: Is that the year 1950?

Mr. Moore: Yes, 1950, Your Honor.

The Court: That is 27, do you mean?

Mr. Bantz: Yes, 27 for Identification for the year 1950.

The Court: Well, I think that that should be admitted. I think they have been sufficiently identified, that is not all of them, and that is subject to rebuttal or explanation.

Mr. Bantz: Thank you, Your Honor.

Q. Would you please examine Plaintiff's Exhibit 4, which is the income tax return of 1951 for Joe Palermo. Have you reviewed that before, Mr. Simonson?

A. Yes, I have.

Q. And you are familiar with it?

A. Yes, I am familiar with it.

(Testimony of Paul Simonson.)

Q. Now, Mr. Simonson, handing you Plaintiff's Exhibit 72, have you seen that before?

A. Yes, I have.

Q. And have you reviewed it before?

A. Yes, I have.

Q. And just what is Plaintiff's Exhibit 72?

A. That is the receipt record—that is photostatic copy of Mr. Joe Palermo's receipt record for 1951.

Q. And where did you receive that?

A. That was received from Mr. Moore. [266]

Q. Now, checking Plaintiff's Exhibit 72 against Plaintiff's 4, can you look and tell whether the figures on Plaintiff's Exhibit 72 appear on Plaintiff's Exhibit 4 as to income?

A. The amounts recorded on Plaintiff's Exhibit 72, the total of those amounts agree with the total shown on Exhibit 4, the income tax return.

Q. For the same year?

A. For the same year.

Q. All right. Now, handing you Plaintiff's Exhibit 28 for Identification, will you examine that please. Now, have you seen that exhibit before?

A. Yes, I have.

Q. And have you reviewed that exhibit before?

A. Yes, I have.

Q. Now, have you had an opportunity to compare Plaintiff's Exhibit 28 for Identification with Plaintiff's Exhibit 72 and Plaintiff's Exhibit 4?

A. Yes, I have.

Q. What is the general comparison between

Testimony of Paul Simonson.)

Plaintiff's Exhibit 28 for Identification and Plaintiff's Exhibits 4 and 72?

A. The total of the figures on Exhibit 72 agrees with the total shown on Exhibit 28 and on Exhibit 2, the income tax return. The totals are all the same for gross receipts.

Mr. Bantz: Your Honor, I am going to offer Plaintiff's [267] Exhibit 28 for Identification that was previously identified by Mr. Bates.

Mr. Moore: Same objection, Your Honor, improperly identified.

The Court: All right, it will be admitted.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits Nos. 27 and 28.)

Q. Handing you Plaintiff's Exhibit 5, will you please examine the exhibit? What is it and have you seen it before?

A. This is income tax return of Joe Palermo and Bertha Palermo for the year 1952, and I have seen it before.

Q. And have you reviewed it previously?

A. Yes, I have.

Q. Handing you Plaintiff's Exhibit 73, have you seen that Exhibit?

A. Yes, I have.

Q. What is that Exhibit?

A. That is photostatic copy of receipt record of Joe Palermo for the year 1952.

Q. And where did we receive Plaintiff's Exhibit 73?

A. From Mr. Moore.

(Testimony of Paul Simonson.)

Q. And that alleges to be the receipts for the year 1952? A. Yes, sir. [268]

Q. Handing you Plaintiff's Exhibit 29 for Identification, would you please examine Exhibit 29. Have you seen Plaintiff's Exhibit 29 for Identification before, Mr. Simonson?

A. Yes, I have.

Q. Have you had an opportunity to examine Plaintiff's Exhibit 29 for Identification along with Plaintiff's Exhibit 73 and Plaintiff's Exhibit 5?

A. I have.

Q. And how does Plaintiff's Exhibit—Is that 28? A. 29.

Q. 29 compare with Plaintiff's Exhibit 73 and Plaintiff's Exhibit 5?

A. The gross receipts figure on all these three are exactly the same.

Q. And are all for the same year?

A. Yes, all for the same year.

Q. And all for Mr. Palermo?

A. Yes, all for Mr. Palermo.

Mr. Bantz: Your Honor, at this time I will offer in evidence Plaintiff's Exhibit 29.

Mr. Moore: Same objection, insufficient identification.

The Court: Admitted. That is for the year 1952?

Mr. Bantz: That is for the year 1952.

(Whereupon, said document was [269] admitted in evidence as Plaintiff's Exhibit No. 29.)

(Testimony of Paul Simonson.)

Q. Mr. Simonson, handing you Plaintiff's Exhibit 6, will you please see if you have seen it before and state what it is and if you are familiar with it?

A. This is income tax return for the year 1953 of Joe and Bertha Palermo. I have seen it before and I have had a chance to look it over.

Q. Handing you Plaintiff's Exhibit 74, will you please examine that and state what it is?

A. This is photostatic copy of receipts record of Joe Palermo for the year 1953.

Q. And where did you see that previously?

A. Well——

Q. Or where did you get it?

A. Mr. Moore gave it to us.

Q. To you or Mr. Blankenship?

A. Yes, to Mr. Blankenship.

Q. Were you present at that time?

A. No, I wasn't.

Q. Have you had an opportunity to review it while it has been in evidence? A. Yes.

Q. Handing you Plaintiff's Exhibit 30 for Identification, have you seen Plaintiff's Exhibit 30 for Identification [270] before? A. Yes.

Q. And have you had a chance to check it over?

A. Yes, I have.

Q. Now, Mr. Simonson, have you had an opportunity to examine Plaintiff's Exhibit 30 for Identification in connection with Plaintiff's Exhibit 74 and Plaintiff's Exhibit 6? A. Yes, I have.

(Testimony of Paul Simonson.)

Q. And how does the Plaintiff's Exhibit 30 for Identification compare with Plaintiff's Exhibits 6 and 74?

A. The figure for gross receipts on Exhibits 30 and 74 is exactly the same. However, on the income tax return, Exhibit 6, where Exhibits 30 and 74 show seventy-three cents at the end of gross receipts, Exhibit 6 shows seventy-two cents.

Q. In other words, on Plaintiff's Exhibit 6 it reads \$102,901.72? A. Yes.

Q. And what does it read then on Plaintiff's Exhibit 30? A. \$102,901.73.

Q. Does it appear to be the same item?

A. Yes.

Mr. Bantz: Your Honor, I offer Identification 30 in evidence.

Mr. Moore: Same objection, insufficient identification.

Mr. Bantz: Your Honor, I offer it in [271] evidence.

The Court: Will counsel step up to the bench with the exhibit.

(Whereupon, the following proceedings occurred at bench.)

The Court: This is supposed to be Bates' work sheet?

Mr. Bantz: That is what he testified he got from Palermo.

The Court: Oh, I see.

(Testimony of Paul Simonson.)

Mr. Bantz: And here are his books and records.

Mr. Moore: He couldn't even see.

The Court: The boy testified that it wasn't even in his father's handwriting.

Mr. Bantz: He testified that he got the papers that he wrote up the income tax from Palermo and that the figure on here coincides with the figure on the income tax return.

The Court: I think that he testified that this 1953 was his handwriting.

Mr. Bantz: Yes.

The Court: He seemed to be able to see better with his glasses off. The reason I was doubtful about it, the boy didn't identify it.

Mr. Bantz: But he did, the father. He testified that he received '53 from Joe Palermo.

The Court: Yes, all right. It will be admitted.

(Whereupon, the following proceeding occurred in open court.)

The Court: It will be admitted. 30 [272]

(Whereupon, said document was admitted in evidence as Plaintiff's Exhibit No. 30.)

Q. Mr. Simonson, handing you Plaintiff's Exhibit 85, will you state if you have seen that before?

A. Yes, I have.

Q. And what is that?

A. That is a photostat of a receipt record for the year 1948, and including 1947, of Joe Palermo.

(Testimony of Paul Simonson.)

Q. All right, handing you Plaintiff's Exhibit 2, have you examined Plaintiff's Exhibit 2 before?

A. Yes, I have.

Q. And what is Plaintiff's Exhibit 2?

A. Plaintiff's Exhibit 2 is an income tax return for the year 1949, of Joe and Bertha Palermo.

Q. And handing you Plaintiff's Exhibit 26 for Identification, have you had an opportunity to examine that? A. Yes, I have.

Q. And what—

A. These are work sheets—

Q. No, just a minute. Have you had an opportunity to compare Plaintiff's Exhibit 26 in connection with Plaintiff's Exhibits 2 and 85?

Mr. Bantz: Excuse me, just a moment, Your Honor.

The Court: Yes. [273]

Mr. Bantz: May I have Plaintiff's Exhibit 70. I got the wrong one.

Q. Handing you Plaintiff's Exhibit 70, have you seen that exhibit before? A. Yes, I have.

Q. And what is that exhibit?

A. That is photostatic copy of Joe Palermo's receipts record for the year 1949.

Q. Now, have you had a chance to compare Plaintiff's Exhibit 70. Plaintiff's Exhibit 2 and Plaintiff's Exhibit for Identification No. 26?

A. Yes, I have.

Q. And what is the comparison?

A. The total receipts—the total figure for receipts shown on each one of those is the same, the total.

(Testimony of Paul Simonson.)

Q. Now, Plaintiff's Exhibit 70 was the receipts of Palermo? A. For the year 1949.

Q. They match the others? A. Yes.

Mr. Bantz: Your Honor, at this time I would like to offer in evidence Plaintiff's 26 which is for the year 1949, not for the purpose of the indictment but to show the general trend and scheme of handling books on prior years and with that limited understanding.

Mr. Moore: Your Honor, I don't think——

The Court: I [274] will ask the jury to step out for a moment.

(Whereupon, the following proceedings occurred in the absence of the jury.)

Mr. Bantz: I just want to put in evidence for the year 1949 to show that there were similar acts or transactions for prior years, and in this particular case he handled it with Mr. Bates the same way that he handled it in 1950, 1951, '52 and '53. We would show the same in 1949.

The Court: You propose to show understatement of income tax for the year 1949?

Mr. Bantz: I do, yes.

The Court: Are you going back of that?

Mr. Bantz: Well, I have 1948 but I don't have the work sheets of Mr. Bates, and I don't propose to go back of that for that reason. I waited until I got all of the evidence in here and there is some indication that I could get some in but I think, your Honor, I am going to stay within 1949 for that particular item.

(Testimony of Paul Simonson.)

The Court: You said you were going to use net worth at present. Actually you used both of them, net receipts for these particular items not included in the returns and the net worth, too, is that it?

Mr. Bantz: Well, I will state that, Your Honor, the net worth used we are going to assume that the net worth which [275] defendant made up doesn't vary much from being correct, and it is in the files and we have an affidavit——

The Court: You are going to have that?

Mr. Bantz: Well, it is offered to us by his attorney under power of attorney and we have it. And I might make an offer of proof as to what may be testified to at this time and that is that our accountants will agree that it is correct, that is in all major phases of it. There may be a dollar or two difference.

The Court: The point I was getting at: When was the beginning of the net worth computations?

Mr. Bantz: We are going to have to go into 1948 a little bit to make this work.

The Court: The reason I was asking that—I will ask Mr. Moore. The reason that I asked, the Government can't start on the first day of the indictment. They are permitted to go back a reasonable time and a reasonable time is considered to be a number of years, and carry it down. Of course, that wouldn't permit the introduction after the beginning date of the net worth computations. It wouldn't permit the introduction of net worth receipts and disbursements. I don't think it would

(Testimony of Paul Simonson.)

make admissible the prior income tax returns for prior years. However, if you claim that there was a similar method of operation and that there was understatement in prior years, then the prior years become [276] admissible for the purpose of bearing on the intent or wilfulness or guilty knowledge, and I think that that is the way that courts have instructed when it has been in the income tax cases. It was in the Bales case and it was affirmed by the Circuit Court of Appeals. I think that can be used. What is your position, Mr. Moore?

Mr. Moore: Well, first of all, I again must urge that Plaintiff's 26 has not been properly identified, that Mr. Simonson has added only that he looked at three sheets of paper and he advised that the gross—what appears to be the gross is the same.

The Court: Do you still claim that as to 26 that Mr. Bates, Senior, said he got that from Mr. Joe Palermo?

Mr. Bantz: Yes, I do.

The Court: I don't know whether it shows that.

Mr. Moore: I don't think that Mr. Bates, Senior, said anything more than: "There's some papers and I can't read them." And he testified generally that Mr. Palermo brought some papers to him for his use in preparing Mr. Palermo's tax returns, but I don't think that he ever testified that 26 for identification were the papers that Mr. Palermo brought or that they were the papers that he used to prepare Mr. Palermo's tax returns, any more than he did the rest of these.

(Testimony of Paul Simonson.)

Mr. Bantz: Well, I think he said that it was taken down from the discussion with Mr. Palermo, so that they were his [277] notes. Now, I am not saying that they can't cross-examine but as to the gross income he testified that he got that information from Mr. Palermo's receipts, from the papers he received from Mr. Palermo and if he did not get the papers he wrote it down from what was said, and certainly you can't get any more positive identification. That was information from Mr. Palermo and certainly you can't get anything more positive than that.

Mr. Moore: May I say one word?

The Court: Yes.

Mr. Moore: I think that the identification of these papers, Plaintiff's 27, 28, 29, and 30 is similar to having his son get on the stand and look at those papers and say: "That is my father's handwriting," and fold them up and seal them, because Mr. Bates didn't see them.

The Court: His eyesight wasn't that bad. The figures were his figures although he wasn't able to identify it entirely. Wasn't he the witness who took his glasses off?

Mr. Bantz: No, there was another witness that took his glasses off.

The Court: If I remember right, he did look and say: "'53 is my handwriting."

Mr. Moore: Then, I can make one more objection and I will be through.

(Testimony of Paul Simonson.)

The Court: Yes. [278]

Mr. Moore: The Government contends that they intend to introduce all of these for the purpose of proving a pattern which is another statement for showing intent. As I remember the cases, Your Honor, the cases require with reference to the proof of intent there must not merely be understatement of income tax nor must there be understatement of income for one year but there must be a consistent pattern, and when they say consistent pattern I think they mean exactly what they say, that there must be some consistent pattern to the under reporting, and I see that there is nothing here to show that with the prior year and the years of '50, '51, '52, and '53 there is a consistent pattern.

Mr. Bantz: Of course, Your Honor, we are going to be out of court if we can't show that there is a pattern from 1948 to 1953 in withholding checks and not putting them on his books, and that is what he was doing. We are showing net worth all along because they came up with net worth and it substantiates our position, but we are certainly going to prove that in 1948 there were checks that weren't recorded, and that he didn't turn into his income tax returns and were not in the books there and that is what I am trying to show here.

The Court: Well, I don't think that the pattern has to be an elaborate pattern.

Mr. Bantz: No. [279]

The Court: And, of course, the Government can't prove all of its case at one time. They have

(Testimony of Paul Simonson.)

to start somewhere with these documents, and if you propose what you are going to show I am going to admit the evidence, and if you don't follow it out the best I can do is grant a motion to strike it and the jury disregard it. I think if you can state what you propose that you should be permitted to show that. As I understand it, you are not going beyond this at this time?

Mr. Bantz: Well, we got some checks and we are going on only to prove one matter on it, and we are going to prove what was identified and what can be identified by the witness on the stand, and I am going to stay right here in the courtroom and I am not going to get out of here and not show any other previous time.

The Court: If you wish, Mr. Moore, the record may show that you object to all of this as prior to the indictment time.

Mr. Moore: Yes, I think I better get up and object.

The Court: Yes. By showing the prior transactions in prior years the record may show your objection without your repeating it each time a question is asked. All right, if you will bring in the jury.

(Whereupon, the following proceedings occurred in the presence of the jury.) [280]

The Court: Now, ladies and gentlemen of the jury, there has been offered here, as you recall before you were sent out to the jury room, there was

(Testimony of Paul Simonson.)

offered some documents which pertained to the calendar tax year of 1949. I call your attention to the fact that the four counts of the indictment cover the tax years which are the calendar years of 1950 through 1953, inclusive. Now, those are the only years on which the defendant is charged in this indictment with attempting to evade income tax by making false and fraudulent returns. The evidence that is offered is for the year 1949, the prior year, the year prior to the first year in the indictment which is only offered for the limited purpose, and that is the United States Attorney is endeavoring to show that there was not only understatement of income tax for the prior year 1949, but that it was in accordance with the same plan and scheme for other years, and by that evidence he hopes to give some consideration of the intent as far as the guilty knowledge when it was made for the prior year. Now, it is only for the purpose of bearing on the wilfullness, as I will define that to you in my instructions, and it is not any evidence that he committed the offenses charged in the indictment. It only goes to the intent. All right, you may proceed.

Mr. Bantz: I will offer 26 into evidence.

The Court: It will be admitted now. Which one did [281] you offer now?

Mr. Bantz: 26.

The Court: 70 is not in yet, according to my notes.

Mr. Bantz: Yes, that's right. And I am going to

(Testimony of Paul Simonson.)

offer, well, I have already made an offer on 2 and 70, Your Honor.

The Court: Well, let me see, 26 will be admitted. You offered that, didn't you?

Mr. Bantz: Yes.

The Court: And then 2?

Mr. Bantz: Yes.

The Court: And 2 will be admitted and 70. The record will show the objections.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits Nos. 26, 2, and 70.)

Mr. Bantz: May I have 66 and 67.

Q. Mr. Simonson, did you have an opportunity to check the records of Mr. Zunke as to the checks he put in evidence or that he testified about?

A. Yes, I have.

Mr. Bantz: Now, Mr. Taylor, let me have Exhibits 12 and 16, would you.

The Court: Both in evidence?

Mr. Bantz: They are, Your Honor. [282]

Q. Handing you Plaintiff's Exhibit 12 and Plaintiff's Exhibit 16, Mr. Simonson, have you had the chance to review those previously?

A. I have.

Q. And have you examined them as to the deposits of Mr. Zunke? A. Yes, I have.

Q. Did you examine the books of Mr. Palermo for the year of 1950 to see if he had recorded the money he received from Mr. Zunke?

(Testimony of Paul Simonson.)

A. I did.

Q. And what did those books and records show?

A. Mr. Zunke testified that three deposits, one dated June 29, 1950, for \$753.46, one dated September 27, 1950, for \$789.37, and one dated November 16th, 1950, in the amount of \$1677.32 were paid to Joe Palermo for logs. I compared those payments and deposits with the record book in Exhibit 71 and none of those three payments were recorded on the books of Joe Palermo.

Q. Mr. Simonson, were the deposits that we are talking about there, or the checks that we are talking about there deposited in the bank?

A. They were.

Q. And what bank were they deposited in?

A. Check for \$753.46 was deposited in the Bank of Stevenson, [283] and the other two checks were deposited at the National Bank of Commerce or Security State Bank at that time in White Salmon.

Mr. Bantz: May counsel approach the bench, Your Honor, for a moment?

The Court: Yes, all right.

(Whereupon, the following proceedings occurred at the bench, away from hearing of the jury.)

Mr. Bantz: Your Honor, I am sorry I didn't take this up at the time the jury was out. We are going to go down through each of these fellows that have testified and put in the present compiled list, Your Honor. I don't want to identify these sep-

(Testimony of Paul Simonson.)

arately if I can avoid it. I am willing to do it, and they are separate items. Can I wait and have a discussion about it and clip them together and offer them as one exhibit and show the compilation?

The Court: Is this the accounting summary?

Mr. Bantz: This is my copy of the summary.

The Court: Made by the witness?

Mr. Bantz: Yes.

The Court: That is evidentiary material?

Mr. Bantz: Yes, that is.

The Court: If Mr. Moore has no objection, certainly I haven't.

Mr. Bantz: I just want to be sure, and I will go over [284] each one.

The Court: Your point is that it would be less confusing if they were all together instead of having separate sheets?

Mr. Bantz: This is what is testified to, I mean this is a total summary of these here.

The Court: This is a recapitulation?

Mr. Bantz: That is right.

The Court: Oh, I see. Well, I have no objection. Of course, counsel should be given an opportunity to object in detail if he wants to.

Mr. Moore: When he introduces it.

The Court: Yes, when he introduces it, of course.

(Whereupon, the following proceedings occurred in open court before the jury.)

Q. Now, Mr. Simonson, did you for the year

(Testimony of Paul Simonson.)

1950 examine the books and records of Mr. Palermo as to receipts from Mr. Ackley of Bingen, Washington? A. I did.

Q. And did you compare them—or check the deposit slips in the bank or the ledger sheets in the bank with the checks paid to Mr. Palermo by Mr. Ackley? A. Yes, I did.

Q. Now, did you check and see what checks were recorded or the record of checks recorded in the books and records of [285] Mr. Palermo from Mr. Ackley in the year 1950? A. Yes, I did.

Q. And how many checks were there recorded in the books? A. Eleven checks.

Q. And were there any checks not recorded in his books and records?

A. There was a check of April 20, 1950, in the amount of \$1,593.71 not recorded on the books. There was a check as of June 20, 1950, in the amount of \$3,475.14 not recorded on the books. There was a check dated December 5th, 1950, for \$516.40, which was recorded on the book. On August 7th, 1950, Mr. Palermo—Mr. Ackley's check in the amount of \$2,612.10 was received by Mr. Palermo and he recorded it on his book at approximately of that date, received from Mr. Ackley \$2,471.10 or \$141.00 less than the actual check. The total there is \$5,726.25 which I did not find recorded on the book.

Q. All right, were the checks which you have

(Testimony of Paul Simonson.)

discussed previously for the year 1950 received from Mr. Ackley by Mr. Palermo deposited in the bank? A. Yes, they were.

Q. And which bank were they deposited in?

A. They were deposited either at the National Bank of Commerce, White Salmon, or the Bank of Stevenson.

Q. Now, Mr. Simonson, did you have an opportunity to examine [286] the records of Mr. Palermo, his books and records as to receipts he received for the year 1950 from Stevenson Plywood Corporation? A. Yes, I did.

Q. Now, would you just state what checks were recorded in the books and records of Mr. Palermo from Stevenson Plywood Corporation, and what checks were not recorded in the books and records?

A. I found fifteen payments recorded in the book. I found April 10, 1950, there is a check for \$465.08 not recorded on the book. On July 10th, 1950, there was a payment——

Q. Just a moment, I am asking you about Stevenson Plywood Corporation. I shifted one sheet, I am sorry. Stevenson Plywood Corporation, would you let me know how many checks were recorded in his books and records and how many were not recorded?

A. There were five checks recorded, and on July—August 31, 1950, there was a check in the amount of \$2,612.63 not recorded on the book, and a check of October 31, 1950, for \$739.12 not recorded

(Testimony of Paul Simonson.)

on the book, a total of \$3,351.75 not recorded on the books.

Q. How much was recorded on the books?

A. \$8,361.49.

Q. And were the checks deposited at the bank?

A. Yes, they were. [287]

Q. All right, now, referring to the receipts of Mr. Palermo for the year 1950, in connection with the McCormick Lumber Company. Did you have an opportunity to review the receipts given to Mr. Palermo from McCormick Lumber Company against his books and records, did you have that opportunity?

A. Yes, I did.

Q. Now, did you find any of the checks recorded in the books?

A. Yes, I did.

Q. And, all right, did you find any not recorded on the books?

A. Yes, I did.

Q. And did you find the checks deposited in the bank?

A. They were all in the year 1951, except for one payment indicated on the McCormick record for \$19.71, they were all deposited to the National Bank of Commerce at White Salmon or the Bank of Stevenson.

Q. You are talking about the year 1950?

A. Yes, the year 1950.

Q. Now, how many checks were recorded in his books and records from McCormick?

A. There were fifteen payments recorded in the books and records from McCormick Lumber Company.

(Testimony of Paul Simonson.)

Q. All right, how many checks were not recorded?

A. There was four checks I saw not recorded at all in the books. However, I would like to explain that, sir. [288]

Q. All right.

A. Mr. Palermo showed recorded in his books a payment of \$1,584.00, a payment of \$1,200.00 for which I could not find a check for McCormick. I did find that on April 10 there was a check for \$465.08 not recorded on the books; July 10, 1950, a payment of \$19.71 not recorded on the book; on August 25, 1950, payment for \$2,632.68 not recorded on the book, and on November 25, 1950, a check for \$2,405.76 not recorded on the book. The total amounts including differences between the checks and the book showed \$3,214.40 not recorded on the books.

Q. The \$3,214.40 you are talking about does not include the checks that you gave him credit for as you have testified about?

A. I credited those payments against the checks which I could not find recorded on the books.

Q. All right. Now, referring to Mr. Palermo again and his books and records of 1950, did you have an opportunity to check them against the record of Joe Courtney as to checks that have been paid by Mr. Courtney to Mr. Palermo?

A. Yes, I did.

(Testimony of Paul Simonson.)

Q. Did you find some that were recorded in his various books and records?

A. I found two in the year 1950 from Joe Courtney were recorded on his records. [289]

Q. And how much did that total?

A. \$889.46.

Q. And did you find any not recorded in his books and records?

A. I found three not recorded in his books and records.

Q. And how much did that amount to?

A. \$1,542.60.

Q. Did you find any of those checks deposited at the bank?

A. I found two of these checks deposited in the bank.

Q. And did you find any not deposited in the bank?

A. I found that there were three payments which were not shown in the bank records. However, one payment is for \$933.00 which was a credit on a truck which Mr. Courtney testified about.

Q. All right, that was testified about?

A. Yes.

Mr. Bantz: Do you want me to start with another one, Your Honor?

The Court: No, I think we may as well adjourn. We will now recess until one-thirty this afternoon.

Thursday, July 25, 1957—1:30 o'Clock P.M.

The Court: All right, proceed.

Q. Mr. Simonson, I believe when we recessed

(Testimony of Paul Simonson.)

that we finished with McCormick Lumber [290] Company? A. No, with Joe Courtney.

Q. Yes, Joe Courtney. Now, did you have an opportunity to examine Mr. Palermo's records in the evidence that is now in the case in connection with the receipts received by Mr. Palermo from the Mt. Adams Loggers Association? A. I did.

Q. For the year 1950? A. 1950.

Q. How many checks were received that year from the Mt. Adams Loggers Association?

A. Six checks.

Q. And how many checks were recorded in his books and records?

A. I found three checks which were marked "Kingley" in Mr. Palermo's record which approximated that amount shown in the Mt. Adams Association.

Q. What did you say they were marked?

A. In his books they were marked "Kingley."

Q. Mr. Kingley was the signator of some checks from Mt. Adams; wasn't Kingley the man who signed some checks from Mt. Adams in 1950?

A. I don't know, sir.

Q. Now, were there any checks from the Mt. Adams Association not recorded in his books and records? A. There were three. [291]

Q. What were they?

A. It was October 18, \$218.23, and October 24, \$186.39, and one on November 20th, 1950, for \$194.60.

(Testimony of Paul Simonson.)

Q. Now, how many checks for the year 1950 were deposited in the bank which in accordance with the records were from the Mt. Adams Loggers Association?

A. Three of those checks were deposited in the bank.

Q. How many were not deposited in the bank?

A. I did not find three checks deposited in the bank.

Q. Now, turning to the year 1950, with Mr. Palermo and the S. D. S. Lumber Company, did you have an opportunity to check his records against the records now in evidence in this court?

A. Yes, I did.

Q. And did you find that there were any checks recorded in his books or records from the S. D. S. Lumber Company?

A. I found a payment recorded in the book in the amount of \$900.00 from S. D. S. Lumber Company in 1950, one payment.

Q. And did you find any not recorded in the book?

A. A check from S. D. S. Lumber Company in August 5, 1950, in the amount of \$148.58 wasn't recorded in the book. However, may I make an explanation, sir?

Q. You bet, or yes, sir.

A. There was a \$900.00 item recorded on Palermo's books for which I don't find in the evidence that S. D. S. Company [292] issued him any checks.

(Testimony of Paul Simonson.)

Q. Well, then, what was the total then of not recorded in the books?

A. Reflecting a credit for the \$900.00 total indicating that as far as the S. D. S. Lumber Company there was an overstatement of income reported of \$751.42.

Q. And on your statement there you show that by a parenthesis, the \$751.42?

A. Yes, I did.

Q. Under the heading, "Not Recorded in Book"? A. Yes, I do.

Q. Now, did you find any checks deposited in the bank? A. No, I did not.

Q. And were any not deposited in the bank?

A. A Check for \$148.58 I did not find deposited in the bank.

Q. Now, Mr. Simonson, I believe Exhibit 16 is the deposits in the Security State Bank at White Salmon, and did you make a compiled list of the checks from Exhibit 16 for the year of 1950 insofar as the ledger sheets—I mean the deposit slips were concerned for Joe Palermo? A. Yes, I did.

Q. And you have entitled it "Total Deposit" and "Identified as Income" or "Non-Income or Unidentified," is that correct? A. Yes. [293]

Q. What do you mean by the words "Identified as Income"?

A. We have in evidence checks which have been put in evidence and those checks have been identified by the witnesses as payment for logs or for other

(Testimony of Paul Simonson.)

services and those are the checks that I have identified as income.

Q. And then there is the heading "Non-Income or Unidentified." What do you mean by that?

A. Those are items on deposit for which there is no checks in evidence or the item wasn't income for some reason. We have not identified it as income in this particular case.

Q. Now, I notice at the top left-hand side is the date January 12, 1940, on my slip which I have erased and put "50." 1950. Is that a typographical error?

A. Yes, it is a typographical error.

Q. And have you changed your copy accordingly?

A. I have changed that in pencil on my copy.

Q. Now, what were the total deposits at the Security State Bank for the year 1950?

A. The total deposits for the year 1950 in the Security State Bank, \$37,204.46.

Q. And how much was identified as income of the total amount?

A. \$36,217.76.

Q. And then there was some of it "Non-Income or Unidentified"?

A. \$986.70. [294]

Q. Now, did you review the bank deposits as to the Bank of Stevenson for the year 1950 in connection with Mr. Palermo?

A. Yes, I did.

Q. And did you make a summary of that?

A. A similar summary to the other one, yes, sir.

Q. Now, for the Bank of Stevenson for the year 1950, what were the total deposits?

(Testimony of Paul Simonson.)

A. \$49,496.56.

Q. And what was the total amount "Identified as Income"? What is the total amount from the exhibits on this trial?

A. Bank of Stevenson, \$44,226.44.

Q. What is the "Non-Income or Unidentified"?

A. \$4,270.01.

Q. And now what is the total bank deposits shown for the two banks, the Security State Bank and the Bank of Stevenson?

A. Total deposit of the two banks is \$86,700.91.

Q. And what is "Identified as Income"?

A. \$80,444.20.

Q. And how much is "Non-Income or Unidentified"? A. \$6,256.71.

Q. Now, Mr. Simonson, did you make such a summary of all of the receipts for the year 1950 for Mr. Palermo, in accordance with the evidence admitted and recorded—that has been recorded in his books and records and that has not [295] been recorded in his books and records as well as being deposited in the bank or not deposited in the bank?

A. I did.

Q. Now, for the year of 1950, then, would you state what the total amount of deposits—no, the total amount recorded in the books and records of Mr. Palermo? A. \$66,090.94.

Q. Now, will you state the amount not recorded in the books? A. \$16,873.70.

Q. And what are the total amount of deposits?

A. \$80,444.20.

(Testimony of Paul Simonson.)

Q. And what is the total amount not deposited?

A. \$2,520.44.

Q. Now, did you make a total summary of how many checks he received during the course of the year?

A. Yes, I did.

Q. And what is the total?

A. There is a total of sixty-two checks.

Q. And how are those checks broken down?

A. We show checks for income '53, and non-income or unidentified checks, nine checks.

Q. And how many checks were recorded in his books?

A. Thirty-six—no, thirty-seven of the income checks.

Q. And how many were not recorded in his books?

A. Sixteen. [296]

Q. And how many checks were deposited?

A. Forty-five checks.

Q. And how many were not deposited?

A. Eight checks.

Q. Now, I believe, Mr. Simonson, that at the bottom or the top of each of the pages in either your handwriting or in somebody else's handwriting you have put the number of the exhibit pertaining to what you have testified about?

A. I have, yes.

Q. That is indicated on each page?

A. Yes.

Mr. Bantz: Would you clip those pages together?

The Clerk: As one exhibit?

(Testimony of Paul Simonson.)

Mr. Bantz: Yes, as one exhibit.

The Clerk: Plaintiff's 86.

Q. Now, Mr. Simonson, handing you Plaintiff's Exhibit 86 for Identification, let me ask you now, that is the summary sheets that you have been working with and reading from while we have been discussing the income from Mr. Palermo for the year 1950, from the evidence that has been produced here in court? A. That is right.

Q. And does that cover a complete summary of receipts insofar as you can tell by reviewing all of the evidence? A. That is right. [297]

Q. Does it show the amounts that have been received, the amounts recorded in his books and records, the amounts not recorded, the amounts deposited and the amounts not deposited individually by accounts and as a total summary?

A. That is right.

Mr. Bantz: Your Honor, at this time I am going to offer Plaintiff's 86 into evidence. I might say that I have—oh, no, I have one more—May I ask a couple more questions?

Q. Mr. Simonson, you have made up an original copy of what you have handed me as Plaintiff's Exhibit 86? A. Yes.

Q. Where is the original? A. You have it.

Q. Is there any difference between the original and the copy, to your knowledge? A. No.

Q. Do you mean as to the figures?

A. Except for the originals which I have originally prepared, I had different headings on those

(Testimony of Paul Simonson.)

and these numbers, and exhibit number to make my report on that.

Q. Let me ask you, by pointing out on Plaintiff's Exhibit 86, your original would be exactly the same except it had your identifying marks on it? A. Yes.

Q. Has your own and Internal Revenue exhibit number? [298] A. That's right.

Q. And it had a heading of some other type on it? A. Yes.

Q. Was there any change in the exact figures presented on this exact summary?

A. No. No, except for possibly typographical errors in transcribing.

Q. Yes.

Mr. Bantz: I will now offer it in evidence, your Honor, and I am prepared to turn over to the defendant a copy of it also with the understanding that it is a copy of the original of which I am willing to have him compare at any time afterward that he desires to compare it with the figures that I have. I would have put in the other but there was a memo on there which I couldn't feel was material to the case.

The Court: I see.

Mr. Moore. Is it all right, Your Honor, if we have just a little bit of time to examine it?

The Court: Yes.

Mr. Bantz: Is it agreeable that I proceed with the next year while you are examining this one?

Mr. Moore: Yes.

(Testimony of Paul Simonson.)

Mr. Bantz: Because I assume your accountant is going to examine it.

Mr. Moore: Yes, all right, fine. [299]

Q. Mr. Simonson, now referring to the year of 1951, do you have in front of you a summary sheet as we just have discussed for the year of 1950?

A. I do.

Q. I will at this time identify it. A. Yes.

Mr. Bantz: Mark it for identification, please. Will you clip the two together? Would you excuse us just a moment, Your Honor?

The Court: Yes. That is Plaintiff's 87.

Q. Mr. Simonson, for the year of 1951 did you compile from the evidence in this trial a summary for the deposits of Mr.—or for the gross income of Mr. Palermo as to being recorded in his books and records and not being recorded in his books and records, as well as the deposits in the bank and not being deposited in the bank for the following individuals or firms: Cecil C. Nichols, Stevenson Plywood, Mt. Adams Loggers Association, McCormick Lumber Company, C. O. Ackley; and then the deposits in the two banks that we have been talking about?

A. I did.

Q. Now, referring to a summary that you made in connection with Mr. Cecil Nichols for the year 1951, how many checks were received by Mr. Palermo during that year? A. Three. [300]

Q. How many checks were recorded in his books and records? A. None.

(Testimony of Paul Simonson.)

Q. And how many were not recorded in his books and records?

A. Three checks were not recorded.

Q. What was the total amount of checks not recorded? A. \$445.85.

Q. And how many were deposited in the bank?

A. There were two checks that were deposited in the bank.

Q. And how many were not deposited in the bank?

A. I found one check wasn't deposited in the bank.

Q. Now, referring still to 1951, and as to Stevenson Plywood Company, did you find any checks—how many checks did you find that had been paid to Mr. Palermo by Stevenson Plywood?

A. I found five checks.

Q. How many were recorded in his books?

A. One check was recorded in his book.

Q. How many were not recorded in his books?

A. There were four checks not recorded in the book.

Q. How many were deposited in the bank?

A. There were five of those checks deposited at the bank.

Q. And how many not deposited at the bank?

A. There were none that were not deposited.

Q. Now, referring to the receipts received by Mr. Palermo from the Mt. Adams Loggers Association for 1951, how many [301] did he receive that year? A. Twelve.

(Testimony of Paul Simonson.)

Q. And how many were recorded in the books?

A. I found one item recorded in the book under the name of McCormick which agrees with the check that he received exactly in amount from the Mt. Adams Loggers Association.

Q. And you checked that with reference to and against the bank records, did you, and the deposit slips?

A. Yes, I did.

Q. And then that was recorded in his book?

A. That one check was recorded in his book.

Q. And how many were not recorded, in his books, out of the twelve?

A. There were eleven not recorded in the book.

Q. And how many were deposited in the bank?

A. Eight.

Q. And how many were not deposited in that at the bank?

A. Four.

Q. Now, referring to the same year, to Mr. Palermo, and checking the McCormick Lumber Company records against the books of Mr. Palermo, how many checks did you find he received from the McCormick Lumber Company?

A. Twenty checks.

Q. How many were recorded in his books and records?

A. Fourteen recorded in his books. [302]

Q. And how many not recorded?

A. There were nine, totaling nine—or six, I am sorry, totaling \$9,365.49.

Q. And how many was the total deposited in the bank?

(Testimony of Paul Simonson.)

A. There were nineteen checks deposited in the bank.

Q. And how many not deposited in the bank?

A. One check.

Q. And going back now to the Mt. Adams Loggers Association, did I ask you what was the total amount not deposited in the books and records for 1951 for Mt. Adams Loggers Association?

A. You asked the number of checks.

Q. What was the amount?

A. Eight, amounting to \$4,924.97.

Q. Not deposited in the bank?

A. There were four checks.

Q. Now, referring to the receipts for the year 1951 from C. O. Ackley to Mr. Palermo, did you check the books and records as to this account?

A. I did.

Q. And how many checks did he receive from Mr. Ackley? A. Fourteen.

Q. And how many checks were recorded in his books?

A. There were thirteen payments recorded in his book.

Q. And how many not recorded in his [303] books? A. There was one.

Q. All right, were there some additional items not recorded in his books or partial payments not recorded in his books?

A. There were. For instance August 9, 1951, he received a check for \$5,053.97 from Mr. Ackley. On that date he—or approximately that date he re-

(Testimony of Paul Simonson.)

corded in his book \$4,853.16, and an understatement there of \$200.81, and the same is true of the check September 10, 1951. The amount, not recorded in the book was \$799.35, less than that, than the actual check.

Q. All right, and then what was the amount of checks not recorded?

A. The total amount of income not recorded in 1951—

Q. No, what was the amount of his checks not recorded in his book—well was the total amount not recorded in his book from Mr. Ackley \$3,502.75?

A. Yes.

Q. Now, as to the National Bank of Commerce, which was formerly Security State Bank, did you have a chance to compile the ledger sheets and the amount of the deposits for the year 1951?

A. I did.

Q. And what was the total deposit for 1951?

A. \$119,898.79.

Q. That is the total amount at the White Salmon bank? [304]

A. That is correct, sir.

Q. And how much was identified as income through the checks and records in evidence?

A. \$118,948.79.

Q. And how much was nonincome or unidentified?

A. \$950.00.

Q. Now, did you compile a summary of unreported income for 1951 that we have been discussing by individuals beforehand?

A. Yes, I had.

(Testimony of Paul Simonson.)

Q. All right, what was the total amount recorded in the books and records of Mr. Palermo?

A. \$98,178.22.

Q. And how much is the total not recorded in his books and records? A. \$21,951.48.

Q. And what was the total amount deposited?

A. The total amount deposited in the bank was \$119,898.79, and the income items there was \$118,48.79.

Q. That wasn't deposited? The last figure wasn't deposited which you read?

A. No, I am sorry, I read deposited.

Q. How much was not deposited in the year 1951? A. \$1,180.91.

Q. Making a total amount of gross income according to the evidence in what amount? [305]

A. That would be a total of \$98,178.22 and \$21,951.48, about \$119,000.00.

Q. What is the total amount of \$121,000.00 that you have got on the lefthand side?

A. That is \$120,129.70.

Q. That is the total amount of gross income?

A. Yes, that's right.

Q. How many were the total checks in 1951 that you received on which the records were received?

A. Fifty-four.

Q. And how many recorded in his books and records? A. Twenty-nine.

Q. And how many were not recorded in his books and records? A. Twenty-five.

(Testimony of Paul Simonson.)

Q. And how many checks were deposited?

A. Forty-eight.

Q. And how many were not deposited?

A. Three checks.

Q. Three? A. No, six checks, I am sorry.

Q. Six checks were not deposited? A. Yes.

Q. How many checks were for nonincome?

A. Three checks were for nonincome.

Q. Again on the bottom of each of the pages, Mr. Simonson, [306] have you in your own handwriting or my stenographer's handwriting generally placed the exhibit number? A. Yes, sir.

Q. Concerning each of these pages?

A. Yes, at the top of each page.

Mr. Bantz: I have offered Plaintiff's Exhibit 87 for evidence, your Honor.

Q. Is your record a duplicate of what you originally made up from the files—from your files and investigation of this case?

A. Except for headings and exhibits.

Q. Headings and exhibit numbers?

A. That is correct.

Q. But the figures and the amounts are the same unless there was typographical errors, I take it?

A. That is right.

Q. Did you have any typographical errors in this one that we changed with pencil?

A. Not that I know of.

Mr. Bantz: If you don't mind, your Honor, I think that they want to be looking at those while I continue.

(Testimony of Paul Simonson.)

The Court: That is all right.

Q. Now, Mr. Simonson, referring to the year 1952, did you make the same type of investigation or cross checking between the books and records of Mr. Palermo and the [307] evidence in this trial either at the time or prior to the time of this trial and then check it in the last day or so as to the year 1952 for the following individuals: Stevenson Plywood, Cecil C. Nichols, Bolter and Landgraf, Roy Landgraf, now deceased, Mt. Adams Loggers Association, S. D. S. Lumber Company, J. Hofert Company, C. O. Ackley, McCormick Lumber Company, Highland Lumber Company, Jackknife Mill, Columbia-Hudson, and the deposits at both banks, the National Bank of Commerce and the Bank of Stevenson?

A. Yes, I did.

Q. Now, the records that you have before you, are they a duplicate or an original report—or a copy of an original report that is in my possession prepared with headings that we have discussed previously?

A. Yes, they are.

Q. And the other identifying marks?

A. Yes.

Q. Now, referring to the year 1952, to the Stevenson Plywood account, did you check your records according to that one?

A. I did.

Q. And find any checks received by Palermo from Stevenson Plywood?

A. I did.

Q. How many checks were received?

A. Six checks. [308]

Q. And what is the total amount?

(Testimony of Paul Simonson.)

A. \$4,701.34.

Q. How many checks were recorded by Mr. Palermo in his books and records?

A. None were recorded.

Q. How many were recorded; did you say none?

A. None were recorded in his books.

Q. What was the total not recorded in his books and records? A. All six totaling \$4,701.34.

Q. How many were deposited in the bank by Mr. Palermo for the year 1952? A. Six checks.

Q. Now, referring to the account of Cecil C. Nichols for 1952, how many checks did Mr. Palermo receive in accordance with the evidence here?

A. Seven checks for 1952.

Q. And what was the total amount of the checks?

A. \$1,397.97.

Q. And were any of them recorded in his books and records? A. No, they were not.

Q. And what was the number not recorded in books by Mr. Palermo?

A. All six—or all seven.

Q. And what was the amount of the checks unrecorded? A. \$1,397.97. [309]

Q. And how many checks were deposited in the bank? A. One check.

Q. And how many checks not deposited in the bank? A. Six checks.

Q. What is the total deposited?

A. \$326.21.

Q. And how much money not deposited?

A. \$1,071.76.

(Testimony of Paul Simonson.)

Q. Referring to the receipts from Roy Landgraf or 1952, did you check that account?

A. Yes, I did.

Q. And what did you find as to the number of checks?

A. There was one check from Roy Landgraf in 1952.

Q. And what was the amount of that check?

A. \$221.27.

Q. And was it or was it not recorded in his books and records?

A. It wasn't recorded in his books.

Q. And was it deposited in the bank?

A. It was deposited in the bank.

Q. All right, refer now to the receipts from Bolter and Landgraf for 1952, what did your investigation show there?

A. I found that he received two checks totaling 490.45. These were checks——

Q. Were these checks recorded or not recorded?

A. They were not. [310]

Q. And what was the total amount not recorded?

A. \$490.45.

Q. And what was the total deposited in the bank?

A. One check for \$231.00.

Q. And what was not deposited in the bank?

A. One check for \$259.45.

Q. In the year 1952 please refer to the Mt. Adams Loggers Association, did you check the records as to this account?

A. I did.

(Testimony of Paul Simonson.)

Q. And what was the number of checks he received from the Mt. Adams Loggers Association?

A. There were fourteen checks from Mt. Adams.

Q. And what was the total amount of the checks?

A. \$3,686.95.

Q. And how many were recorded in his books and records?

A. None were recorded in his books.

Q. There were fourteen not recorded in his books and records?

A. That is correct.

Q. And the total amount not recorded in his books?

A. \$3,686.95.

Q. And how much was deposited in the bank?

A. \$3,431.71, twelve checks.

Q. And how many were not deposited?

A. Two checks for \$255.24.

Q. Now, referring to the account of S. D. S. Lumber Company [311] for the year 1952, did you examine the checks payable to Joe Palermo?

A. Yes. There was one check for \$762.45.

Q. Was this recorded in his books and records?

A. It wasn't.

Q. Was it deposited in the bank?

A. It was deposited in the bank.

Q. And the receipts from J. Hofert Company for 1952 to Joe Palermo, what does this account show?

A. It shows one check in the amount of \$100.00.

Q. Was it or was it not recorded?

A. It wasn't recorded in the book.

Q. And was it deposited in the bank?

A. It wasn't deposited in the bank.

Q. Referring to the receipts for the year 1952

(Testimony of Paul Simonson.)

Q. From C. O. Ackley, did you find any checks or does the evidence show any checks received from Mr. Ackley for this year? A. Yes, sir.

Q. How many? A. Eleven.

Q. What was the total amount that year?

A. \$44,496.68.

Q. How many checks were recorded in his books and records? A. Eight checks.

Q. What was the total amount recorded? [312]

A. \$33,150.74.

Q. How many checks were not recorded in his books and records? A. Three.

Q. And what was the total amount of those not recorded?

A. It was \$11,345.94, in income not reported.

Q. All right, what was the total amount deposited in the bank? A. \$44,496.68.

Q. Referring, Mr. Simonson, to the McCormick Lumber Company account for 1952 will you refer to that and the material that is in evidence, how many checks did you find that the McCormick Lumber Company paid to Joe Palermo, if any?

A. Twenty checks.

Q. What was the total amount of those checks?

A. \$66,800.44.

Q. And how many checks were recorded in his books and records? A. Seventeen.

Q. And what was the total amount recorded in his books and records? A. \$61,905.91.

Q. And how many were not recorded in his books and records?

(Testimony of Paul Simonson.)

A. There were three not recorded on his books and records.

Q. And what was the total amount not recorded?

A. The total not recorded in his books was \$4,894.53.

Q. And what was the total amount deposited in the bank? [313] A. \$66,800.44.

Q. All right, refer to the Highland Lumber Company, Inc., for the account of Joe Palermo in 1952, what did your investigation show as to the number of checks received? A. Two.

Q. And what was the total of those two checks?

A. \$2,172.96.

Q. How many checks were recorded in his books and records? A. One.

Q. And how many were not recorded?

A. One.

Q. And what is the total amount not recorded in his books and records? A. \$1,857.60.

Q. How many were deposited in the bank?

A. Both checks, \$2,172.96.

Q. Now, referring, Mr. Simonson, to the account of the Jackknife Mill, parentheses L. C. Coleman, who I think the evidence shows was the owner, what do your records show with reference to this account?

A. One check for 1952.

Q. What is the total amount?

A. \$1,368.00.

Q. Was that recorded in his books and records?

A. That was recorded. [314]

Q. Referring to the receipts from Columbia-Hud-

(Testimony of Paul Simonson.)

Q. On Company in 1952, what does your investigation show as to the number of checks received?

A. One.

Q. And what was the amount?

A. \$1,212.26.

Q. And that this recorded?

A. Yes, it was.

Q. And was it deposited?

A. It was deposited.

Q. Now, Mr. Simonson, did you make a summary of the bank deposits to the National Bank of Commerce, White Salmon, for 1952 in which you identified the total deposits, and identified as income and nonincome or unidentified?

A. Yes, I did.

Q. Now, what was the total amount of deposits for 1952 in this bank?

A. \$128,206.54.

Q. And what was the total amount Identified as Income?

A. \$123,866.72.

Q. And what was the total amount of Nonincome or Unidentified?

A. \$4,339.82.

Q. Now, do you have a summary of the Bank of Stevenson for 1952?

A. Yes, I do. [315]

Q. All right, what was the total amount of money deposited that year?

A. \$1,857.60.

Q. And was this identified as income?

A. It was.

Q. Now, what was the total amount for the two banks, then, for gross receipts for the year 1952 as shown by the deposit slips?

A. The total deposits were \$130,064.14.

Q. And identified as income?

(Testimony of Paul Simonson.)

A. \$125,724.32.

Q. And nonincome or unidentified?

A. \$4,339.82.

Q. Now, did you, Mr. Simonson, prepare a summary of the receipts for the year 1952 concerning all of the companies or individuals that we have discussed for the year 1952? A. I did.

Q. And what was the total amount of the checks for the year 1952?

A. Total amounts of the checks, income checks was \$127,410.77.

Q. And the total amount of nonincome and unidentified? A. \$4,339.82.

Q. Then, what was the total of the bank account for the year? A. \$131,750.59.

Q. And what was the total amount recorded in his books? [316] What was the total for the year 1952? A. \$97,952.27.

Q. And what was the total amount not recorded in his books for 1952? A. \$29,458.50.

Q. And how much was the total amount deposited?

A. The total amount deposited of income was \$125,724.32.

Q. And how about nonincome deposits?

A. \$4,339.82, a total of \$130,064.14.

Q. And what was the total amount not deposited for the year 1952? A. \$1,686.45.

Q. All right, what were the total number of checks received during the year by Mr. Palermo insofar as the records show?

A. Sixty-seven income checks.

(Testimony of Paul Simonson.)

Q. And how many unidentified or nonincome?

A. Thirteen.

Q. And how many checks were recorded in his books and records?

A. Twenty-eight recorded, twenty-eight checks.

Q. And how many were not recorded in his books and records?

A. Thirty-nine were not recorded in his books and records.

Q. Thirty-nine income checks?

A. That is correct. [317]

Q. And how many nonincome?

A. Thirteen.

Q. Were not shown in his books?

A. Yes, were not shown in his books.

Q. How many checks were deposited in the bank account? A. Fifty-seven.

Q. Income checks? A. Yes, income checks.

Q. And how many unidentified checks?

A. Thirteen.

Q. How many did you say, Mr. Simonson?

A. Thirteen nonidentified checks.

Q. And how many did you find of the checks were not deposited for the year 1952?

A. Ten checks were not deposited.

Q. Mr. Simonson, are the figures in——

Mr. Bantz: Just a moment, would you mark this for identification? It needs to be stapled together.

The Clerk: Plaintiff's 88.

Q. Mr. Simonson, in Plaintiff's 88 for Identification, is this the sheets that you have been reading

(Testimony of Paul Simonson.)

from for the year 1952? A. It is.

Q. Are they the same—the figures the same as your original sheets in your file of the Internal Revenue file concerning [318] the year 1952?

A. It is.

Q. With the same exceptions that we have discussed previously? A. That is correct.

Q. But the figures themselves are the same?

A. Yes, the figures are the same.

Q. And on these you have placed here in your own writing or someone else's writing what exhibit is on each sheet, is that correct?

A. That is correct.

Q. That is written on each sheet? A. Yes.

Mr. Bantz: At this time, your Honor, I will offer Plaintiff's 88 in evidence and give them a copy.

The Court: All right.

Q. Mr. Simonson, in the previous reports that we have been discussing there, counsel and I noticed that on the bank statements you have the letter "S" to the left of the amount. What does that mean?

A. I have keyed the Bank of Stevenson.

Q. And if there is no "S" in front of it, what does that mean?

A. That means it went to the National Bank of Commerce or formerly Security State Bank.

Q. They are the accounts that are in evidence?

A. Yes, they are. [319]

Q. Now, Mr. Simonson, referring to the year 1953, did you make a similar study and comparison for the year 1953 with Mr. Palermo's books and rec-

(Testimony of Paul Simonson.)

ards and for the accounts with Stevenson Plywood, Jackknife Mill, McCormick Lumber Company, Mt. Adams Loggers Association and Seaton and Sprague, and the two banks—or the National Bank of Commerce deposits? A. I did.

Q. Now, referring to the Stevenson Plywood account for 1953 for Mr. Palermo, what does your investigation and your records that are in evidence here show as to the number of checks received for this year?

A. There were nine checks received.

Q. And what was the total amount of the checks received? A. \$16,034.87.

Q. And how many checks were recorded in his books and records?

A. There were four recorded in his books and records.

Q. And how much was the total amount?

A. \$9,543.83.

Q. And how many checks were not recorded in his books and records?

A. There were five checks not recorded.

Q. And what was the total amount of the checks not recorded? A. \$6,491.04. [320]

Q. And how many checks were deposited in the bank? A. Five.

Q. And what was the total deposit?

A. \$13,955.37.

Q. And how many checks were not deposited in the bank?

(Testimony of Paul Simonson.)

A. \$2,079.50—Four checks, I am sorry.

Q. Would you state that again?

A. There were four checks not deposited in the bank.

Q. And what was the total? A. \$2,079.50.

Q. All right, referring now, Mr. Simonson, to the Jackknife Mill, parentheses L. C. Coleman, for the year 1953, what did your investigation show as to the number of checks paid to Mr. Palermo for this year? A. There were eight checks.

Q. And what was the total amount?

A. \$21,129.02.

Q. And were these checks recorded on the books?

A. They were.

Q. And were any not recorded?

A. Except for the variation in a figure, all were recorded.

Q. How many were deposited in the bank?

A. Six.

Q. How many were not deposited?

A. Two checks. [321]

Q. Now, Mr. Simonson, in reference to the McCormick Lumber Company for 1953, what does the records show as to the amounts paid by the company to Joe Palermo; how many checks?

A. Thirteen checks.

Q. And what was the total amount of those checks? A. \$28,970.35.

Q. How many checks were recorded in his books and records? A. Eleven.

Q. And what was the total amount recorded?

(Testimony of Paul Simonson.)

A. \$26,629.67.

Q. And how many checks not recorded in his books and records? A. Two.

Q. And what was the total amount of the two?

A. \$2,340.68. With the variation in one of the total amount unrecorded was \$2,340.68.

Q. Now, I notice there is a difference in the figures there of \$29.22 in the check of May 28, 1953. Would you please explain that?

A. The check in evidence is in the amount of \$2,-649.22. Mr. Palermo recorded in the amount about that time of \$2,600.00 income from McCormick Lumber Company on his records.

Q. And the McCormick records show the same, does it?

A. The McCormick records shows \$2,649.22.

Q. And you have then carried the \$49.00 over as an unrecorded [322] item? A. That is correct.

Q. How many checks were deposited in the bank?

A. Twelve.

Q. And how many not deposited? A. One.

Q. Now, Mr. Simonson, referring to the Mt. Adams Loggers Association account for 1953, what does your investigation show as to the number of checks received by Mr. Palermo from this company for that year? A. Twenty-five checks.

Q. What is the total amount of the checks?

A. \$18,785.08.

Q. And how many checks were recorded in his books and records? A. Thirteen.

Q. And how many checks were not recorded?

(Testimony of Paul Simonson.)

A. Twelve.

Q. What was the total amount of the checks recorded? A. \$13,661.40.

Q. And what was the total amount not recorded?

A. \$5,123.68.

Q. And how many checks were deposited to the bank account? A. Twenty.

Q. What is the total amount deposited?

A. \$16,365.67. [323]

Q. And how many checks were not deposited in the account? A. Five checks.

Q. And what was the total amount?

A. \$2,419.41.

Q. Now, Mr. Simonson, referring to the record of receipts from Seaton and Sprague, what does your record show and your investigation show as to the number of checks for the year 1953 received by Mr. Palermo from Seaton and Sprague?

A. Six checks.

Q. What is the total amount of the checks?

A. \$31,946.57.

Q. And he recorded these checks and he deposited them? A. He did.

Q. Now, referring to the compiled bank statement of the Nt. Bank of Commerce for 1953, did you compile the list of the deposits and the money identified as income and the list of nonincome or unidentified? A. I did.

Q. Now, before we go on again, why do you classify some of the monies as nonincome or un-

(Testimony of Paul Simonson.)

identified in this here? I notice a \$1,500.00 item dated July 15, 1953, from the Mt. Adams Loggers Association, nonincome or unidentified.

A. That \$1,500.00 item was Mr. G. L. Gibbons.

Q. Oh, yes. [324]

A. We did not contact Mr. Gibbons regarding that payment and did not find exactly what it was for, or else it was a payment for something—sale of equipment or something like that.

Q. All right, let me ask you this then, the matters listed in these and identified as income are the matters of checks that are in evidence in this trial, is that correct?

A. That is correct.

Q. And we are not alleging anything as to the other income?

A. No.

Q. Now, for the year 1953 what was the total amount of deposits at the National Bank of Commerce at White Salmon?

A. \$119,088.72.

Q. And how much was identified as income?

A. \$111,886.16.

Q. And how much is nonincome or unidentified, as we explained?

A. \$7,202.56.

Q. Now, Mr. Simonson, did you make a summary of the amount of money received for the year, the amount recorded in the year, and the amount not recorded, and the amount deposited and the amount not deposited?

A. I did.

Q. All right, and will you state what amount of money that the records show that he received for the year 1954? [325]

(Testimony of Paul Simonson.)

Mr. Velikanje: 1953.

Mr. Bantz: 1953, pardon me.

Q. Income and nonincome?

A. The total amount is \$124,068.45.

Q. How much was recorded in the books?

A. \$102,901.73.

Q. How much was not recorded in the books or records? A. \$13,964.16.

Q. And how much money was deposited in the bank account, both income and unidentified?

A. \$119,088.72.

Q. And how much money was not deposited in the bank? A. \$4,979.73.

Q. All right, Mr. Simonson, how many checks did he receive as a total in 1953, as far as the records show? A. Seventy checks.

Q. And how many checks were recorded in the books? A. Forty-two.

Q. And how many checks were not recorded in the books and records?

A. Of the income nineteen.

Q. And how many of the nonincome?

A. Nine.

Q. And how many checks deposited in 1953?

A. Fifty-eight checks. [326]

Q. Including nonincome?

A. Yes, including nonincome.

Q. How many checks were not deposited for the year 1953? A. Twelve checks.

Q. Twelve checks not deposited? A. Yes.

(Testimony of Paul Simonson.)

Mr. Bantz: Clip that together, please, and mark it for identification.

The Clerk: Plaintiff's 89.

Q. Mr. Simonson, Plaintiff's Exhibit 89 for Identification is what you have just been reading from and testifying from? A. It is.

Q. Is this a true copy of the original report that you made and which checks with the evidence now in this trial? A. It is.

Q. The only difference being what we talked about in the other one? A. That is correct.

Q. And I notice there is some writing on here listing some exhibits and exhibit numbers. Did you place that there? A. Yes, I did.

Q. And is that in connection with the trial here?

A. Yes. Yes.

Q. Otherwise, they are the same as your original records? [327] A. That is correct.

Mr. Bantz: I will offer Plaintiff's 89, your Honor. I will give counsel a copy of the same.

Mr. Moore: With reference to Plaintiff's Exhibits 86, 87 and 88 for Identification, and also 89, assuming that that is the same, whenever on these summaries you have parentheses around something you mean that it is the reverse of what monies is in the column? A. That is correct, yes.

Mr. Moore: In other words, it means if it shows not recorded in book for instance and there are a number of columns and there is one that has parentheses around it, it means it is recorded in the book

(Testimony of Paul Simonson.)

but you couldn't find it and tie it in with the checks elsewhere? A. I think that is correct.

Mr. Moore: This \$151.42 item?

A. Yes, I think that is correct.

Mr. Moore: And also with reference to 86, 87, 88, and 89, when you refer to money that is on the books and records of Mr. Palermo, and you referred to that in your testimony and in the exhibits themselves, you referred to recorded in the book or not recorded in the book, by that you mean that they were or were not recorded according to the gross earnings statements, the photostats which are in evidence as Exhibits 70, 71, 72, 73, and 74? [328]

A. That is correct.

Mr. Moore: And you did not mean by your testimony that they were or were not recorded in any other records which Mr. Palermo might have had as far as you know?

A. No, they were not recorded in the gross receipts records which we obtained from your office as to the figures.

Mr. Moore: In other words, any papers or slips or anything else that Mr. Palermo may have had in his possession relating to receipts, for instance, assuming that he had something else in his possession, which would indicate receipt of a check which you say is not recorded in book, it may have been in his possession by a record showing a receipt of that check, but you merely refer to one page in this book or two pages in this book?

(Testimony of Paul Simonson.)

A. I referred to one or two pages which you gave me as a receipt record.

Mr. Moore: And just to clear it up, that is what you asked for, wasn't it? A. That is correct.

Mr. Moore: I have no objection.

The Court: To any of these four?

Mr. Bantz: He is still checking 89.

The Court: Oh, I see. 86, 87, and 88 are admitted.

(Whereupon, said summaries were admitted in evidence as Plaintiff's Exhibits, 86, 87, and 88.) [329]

Q. Now, Mr. Simonson, as to Plaintiff's Exhibits 86, 87, and 88, did you have any knowledge of any other books or records than what you checked?

A. No, I did not.

Q. Did you ask for all the books and records for those years covered in those exhibits, for the receipts? A. We asked for the receipts record.

Q. And those are what you got for that year?

A. Yes.

Mr. Bantz: For clarification may I ask the witness on a couple of matters?

The Court: Yes.

Q. Referring to Plaintiff's Exhibit 89, counsel would like to know what are the partial parentheses here.

A. There are two checks in evidence. One is dated February 16th, 1953, and also February 25, 1953. The checks are \$78.12 and \$111.24. I put the paren-

(Testimony of Paul Simonson.)

theses there to indicate that they go with the item shown on Palermo's records as \$180.60.

Mr. Moore: That is supposed to be in effect a bracket?

A. Yes, that is in effect a bracket. It should be.

Mr. Moore: Yes, I see. No objection to 89, your Honor.

The Court: 89 will be admitted.

(Whereupon, said summary was admitted in evidence as Plaintiff's Exhibit No. 89.) [330]

Q. Mr. Simonson, handing you Plaintiff's Exhibit 14, would you examine that Exhibit?

A. Yes, sir.

Q. Have you had a chance in the past to check through that Exhibit? A. I have.

Q. And what generally is that exhibit?

A. Those are deposit tickets to Joe Palermo's account at White Salmon Bank in Washington.

Q. For what year? A. 1948.

Q. All right, handing you Plaintiff's Exhibit 15, would you examine that. Have you had a chance to see that previously? A. I have. I have.

Q. And have you had a chance to look the matter over in connection with this case? A. I have.

Q. And just generally what is that?

A. Those are deposit tickets to Joe Palermo's deposit account in 1949 in the Security State Bank at White Salmon.

Mr. Bantz: May I have Plaintiff's Exhibits 22, 25, 47 and 49.

Testimony of Paul Simonson.)

Q. Mr. Simonson, handing you Plaintiff's Exhibit 22 for Identification, will you please examine that exhibit? [331] A. Yes.

Q. Have you seen that exhibit before?

A. I have.

Q. And have you had a chance to check it over?

A. Yes.

Q. And just generally what is that exhibit?

A. It is ledger sheet to the account for Joe Palermo for the years beginning June, 1947, through November 23, 1949, in the Security State Bank.

Q. And do you recall that part of 1949 is on the other exhibit, I believe it is 23?

A. Yes; I recall.

Q. And has been admitted?

A. I recall, yes.

Q. Handing you Plaintiff's Exhibit 85 for Identification, will you examine that, please?

A. Yes, sir.

Q. Have you seen that before?

A. Yes, I have.

Q. And where did you receive that?

A. I received that from Mr. Moore on September 14, 1955.

Q. And what does that purport to be?

A. That is photostatic copy of receipts record of Joe Palermo for 1948 and also included receipts for 1947.

Q. Is that partial for 1947 or total? [332]

A. I believe that is the total for 1947.

Mr. Bantz: Your Honor, if we could have about

(Testimony of Paul Simonson.)

ten minutes, I will try and get my exhibits down and start going. We need about that time.

The Court: All right, we will take a recess.

(Whereupon, after recess the following proceedings occurred:)

Q. Mr. Simonson, for the years of 1950, 1951, 1952 and 1953, did you make a summary of the number of checks that were received by Mr. Palermo, and the number that were recorded in his books and records and the number that were not recorded in his books and records? A. I did.

Q. And what is that summary for the four years included in the indictment?

A. The total for the four years shows that Palermo received 235 checks for logs or services. There were 99 checks not recorded on the books, and the percentage of those items were 42.1 per cent.

Q. Now, Mr. Simonson, did you make this summary that you just read from the figures that you have talked about here in the past one and a half hours of the summary that you made for the years 1950, 1951, 1952, and 1953? A. Yes, sir.

Q. And, then, you added to that the preparation of the [333] percentages of the number of checks, at my request? A. That is correct.

The Clerk: Marking Plaintiff's 90, your Honor.

Q. And this is in conjunction with the matters that are in evidence and have been admitted?

A. That is correct.

(Testimony of Paul Simonson.)

Mr. Bantz: I will offer this summary in evidence.

Mr. Moore: Of what?

Mr. Bantz: Of all income checks.

Mr. Moore: No objection.

Mr. Bantz: No objection, he said.

The Court: All right, it will be admitted.

(Whereupon, said summary of checks was admitted in evidence as Plaintiff's Exhibit No. 90.)

Q. Mr. Simonson, handing you Plaintiff's Exhibit No. 1 for Identification, have you had an opportunity to see that? A. I have.

Q. And what is that?

A. This is the 1948 income tax return of Joe Palermo and Bertha Palermo.

Q. And you are familiar with it? A. I am.

Q. Mr. Simonson, handing you Plaintiff's Exhibit 42 for [334] Identification? A. Yes, sir.

Q. Have you seen that exhibit before?

A. I have.

Q. Have you made some calculations concerning that exhibit? A. I have.

Q. And what is that exhibit?

A. That is a check of the S. D. S. Lumber Company, dated July 2, 1948, in the amount of \$750.33 and payable to Joe Palermo.

Q. Now, handing you Plaintiff's Exhibit 33, just state if you have seen those before and had a chance to review those before? A. I have.

(Testimony of Paul Simonson.)

Q. Now, generally what are they, not specifically, but just what are they?

A. Those are checks of Columbia-Hudson Lumber Company, for the year 1948, made payable to Joe Palermo.

Q. Now, handing you Plaintiff's Exhibit 77 for Identification, have you seen that exhibit before?

A. Yes, I have.

Q. What is the exhibit?

A. Those are two checks made payable to Joe Palermo in the year 1948 by Lyle Lumber Company.

Q. Now, I believe I have just showed you Plaintiff's Exhibits [335] Nos. 22, 14, which is the deposit slips all concerning the year 1948, Plaintiff's Exhibit 85, and the three groups I just handed you just a moment ago, which were Plaintiff's Exhibits 77, 33 and 42. Now, have you had a chance to make a schedule concerning the checks of 1948?

A. I have.

Q. That is concerning the companies or individuals that are shown in Plaintiff's Exhibits for Identification 42, 33, 77, and 85, 14 and 22?

A. That is correct.

Q. Mr. Simonson, have you had a chance to check the checks and other matters here against the gross receipts book of Mr. Palermo for the year of 1948?

A. The photostatic copy, yes.

Q. The photostatic copy given to you by Mr. Moore?

A. Yes, Mr. Moore.

Q. And, then, that is from what you made up a schedule?

A. That is correct.

(Testimony of Paul Simonson.)

Mr. Bantz: I will have it marked for identification.

The Clerk: That will be Plaintiff's 91.

Q. Handing you Plaintiff's Exhibit 91 for Identification, that is your work sheets?

A. That is my work sheets.

Q. For the year 1948?

A. '48, yes, sir. [336]

Q. And is that concerning the matters of exhibits that we have been talking about here, including Exhibit 85 which has been identified as the Palermo Gross Receipts for 1948?

A. That is correct.

Q. And what generally does that exhibit show, not specifically, but what is it made up for?

A. It shows the total amount of checks received from these customers, the amount recorded on the books, not recorded on the books, deposited in the bank, and not deposited in the bank.

Q. For the year of 1948?

A. Yes, for the year of 1948.

Q. For Joe Palermo? A. Yes.

Mr. Bantz: Your Honor, at this time I am going to offer Plaintiff's 91, which is the compiled summary of Plaintiff's Exhibit 42, which is the checks of S. D. S. Lumber Company, Plaintiff's Exhibit 33 from Columbia-Hudson Lumber Company, Plaintiff's Exhibit 77 from Lyle Lumber Company, Plaintiff's Exhibit 85, which I only wish to offer the part of that referring to the year of 1948, and any way that the Court desires me to cut out 1947, and Plaintiff's Exhibit 14, which are the bank deposit slips,

(Testimony of Paul Simonson.)

and Plaintiff's Exhibit 22, which are the deposit registers of the bank account or the checking [337] account of the bank account at White Salmon, and the only part I want to submit is the part covering the year 1948. I also want to offer Plaintiff's Exhibit 1, which is the income tax return of Joe Palermo for the year of 1948, and I make such offer only for the purpose that I want to show that there was similar actions or transactions in the indictment years, and for not any money of those particular years, except as to similar transactions that will be testified from Plaintiff's Exhibit 91 that I have offered in evidence.

The Court: Mr. Moore, do you want the record to show an objection to it?

Mr. Moore: Yes, an objection. Do you want me to state it as I did on the prior objection?

The Court: Yes.

Mr. Moore: First of all, with reference to all of the exhibits for identification recited by Mr. Bantz, and he has now offered, as immaterial; and, secondly, with reference to 77 for identification——

The Court: Which one is that, 77?

Mr. Moore: 77. Checks from the Lyle Lumber Company.

The Court: Oh, yes.

Mr. Moore: Insufficient identification.

The Court: Yes.

Mr. Moore: In reference to 91 by reason of [338] its inclusion of the substance of the rest of the exhibits for identification, and that the same has not

(Testimony of Paul Simonson.)

been shown to or even tend to show matters which Mr. Bantz seeks to prove thereby as previously stated on the other exhibits as stated before.

The Court: Very well, without repeating it, I want the jury to bear in mind that the same thing applies to the evidence of 1948, that I previously told you applies to 1949, that it isn't one of the indictment years and does not tend to prove the offense charged in the indictment years which cover subsequent years, but the purpose of it is to show the same pattern or method of operation and is to be considered and given whatever weight you think it is entitled to as bearing on the question of intent of the defendant for the years mentioned in the indictment. Now, I got lost here. These are all scattered around through my notes. The first one is which one? Is that Exhibit 1?

Mr. Bantz: Yes, 1.

The Court: It will be admitted.

(Whereupon, said tax return was admitted in evidence as Plaintiff's Exhibit No. 1.)

The Court: What is the next one in chronological order?

Mr. Bantz: 14. In chronological order, 14. [339]

The Court: Any of this shown for the year prior to 1948 should be deleted or not made visible to the jury.

Mr. Bantz: That is right, I have got the ledger sheet and it shows 1947 and anything I have I will

(Testimony of Paul Simonson.)

take off with counsel's permission. I am not trying to show 1947 in it.

The Court: Well, it will be understood that anything prior to 1948 will be deleted or cut off. What is the next one after 14?

Mr. Bantz: We have 22.

The Court: 22.

Mr. Bantz: I am sticking to the two years 1948 and 1949, Exhibit 22, your Honor.

The Court: I have '47 in my notes.

Mr. Bantz: Well, it does have part of '47 and it will be taken out.

The Court: It will be deleted. You are going to cover '49?

Mr. Bantz: Well, I have covered it with the exception of three items.

The Court: You didn't have 15 in there?

Mr. Bantz: No.

The Court: Now, what is the next one after 14?

Mr. Bantz: 22.

The Court: 22, yes, I have that. [340]

Mr. Bantz: 33.

The Court: All right, 33.

Mr. Bantz: 42.

The Court: Wait just a moment, where is 33. All right, 33 will be admitted.

Mr. Bantz: 42.

The Court: 42 admitted then.

Mr. Bantz: 77.

The Court: All right, admitted.

(Testimony of Paul Simonson.)

Mr. Bantz: 85.

The Court: And 85 is admitted.

Mr. Bantz: And 91 which was the summary, your Honor.

The Court: All right, 91.

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits, 22, 33, 42, 77, 85, 91.)

The Clerk: Your Honor, on the blocking out I would like to have counsel help me designate which of those portions of the exhibits should be blocked out.

The Court: Both counsel, you mean.

Mr. Bantz: Yes, that is agreeable.

The Court: We can do that afterwards.

Mr. Bantz: Now, Mr. Simonson, handing you Plaintiff's Exhibit 91—your Honor, I will just save a little bit of [341] time; I will read this myself. It has been admitted.

The Court: All right. That is all right.

Mr. Bantz: This is a summary of the receipts in connection with Palermo from the Columbia-Hudson Lumber Company during the year 1948. The total amount of money paid to Mr. Palermo is \$9,138.23. There was recorded in the books \$2,789.10. There was not recorded in the books \$6,349.13. There was deposited in the bank \$7,117.58 and there was not deposited in the bank \$2,020.64. In the year 1948 receipts from the S. D. S. Lumber Company, there was a check in the amount of \$750.33. It wasn't re-

(Testimony of Paul Simonson.)

corded in the books and records and it was deposited. In the year of 1948, from Lyle Lumber Company, the records show that there was two checks paid to Mr. Palermo in the amount of \$6,368.44. They were recorded in the books in the amount of \$6,012.42, and not recorded in the books in the amount of \$356.02, and \$6,368.44 was deposited in the bank.

Q. Now, Mr. Simonson, will you please examine Plaintiff's Exhibit 15 for Identification. Have you seen that before? A. I have.

Q. And what is that generally?

A. Those are deposit tickets to the account of Joe Palermo in the Security State Bank, White Salmon, Washington, for the year 1949. [342]

Q. All right, have you had a chance to review those deposit slips in connection with a summary for the year 1949? A. Yes.

Q. Will you examine Plaintiff's Exhibit 43 for Identification and state if you have seen that before?

A. Yes, I have.

Q. And what does that purport to be?

A. That is a check of the S. D. S. Lumber Company to Joe Palermo for \$125.80, dated December 2nd, 1949.

Q. Now, handing you Plaintiff's Exhibit 46, what is that group of exhibits, just generally?

A. Those are checks of C. O. Ackley payable to Joe Palermo in the year 1949.

Q. And handing you Plaintiff's Exhibit 34, have you seen that before? A. Yes, I have.

Q. And what does that purport to be?

(Testimony of Paul Simonson.)

A. Those are checks of the Columbia-Hudson Lumber Company payable to Joe Palermo during the year 1949.

Q. All right, have you used that exhibit in making up a schedule for the year 1949?

A. On my schedule I used photostats which have been checked with these exhibits.

Q. Now, handing you Plaintiff's Exhibit 78 for identification, have you seen that exhibit [343] before?

A. Yes, I have.

Q. Have you checked through it in connection with your summary for the year of 1949?

A. I have.

Q. Is that exhibit for the year of 1949?

A. Yes.

Q. Handing you Plaintiff's Exhibit 80 for identification, have you seen that before?

A. I have.

Q. And have you checked that over in connection with a summary for the year 1949?

A. Yes, I have.

Q. Now, Mr. Simonson, there has been admitted in evidence the income tax return of 1949, the work papers—which is Plaintiff's Exhibit 2 and Plaintiff's Exhibit 26, which are the work papers of Mr. Bates for the year 1949, and Plaintiff's Exhibit 70 for the year 1949, which is the gross earnings of Mr. Palermo as turned over to the Internal Revenue by Mr. Moore. You are familiar with those?

A. I am.

Q. Now, in connection with Plaintiff's Exhibits 2,

(Testimony of Paul Simonson.)

26, 70, that have been admitted, and Plaintiff's Exhibits 15, 34, 46, 78, and 80 that you just looked at on the stand, have you compiled a summary for the year of 1949 showing [344] the amount of monies received in accordance with the gross income of Mr.— in connection with Plaintiff's Exhibit 70 showing the gross receipts of Mr. Palermo as to the checks recorded in his books and not recorded, amounts deposited in the bank and not deposited in the bank?

A. I have.

Mr. Bantz: Would you please mark this for identification?

The Clerk: Plaintiff's 92.

The Court: 92.

The Clerk: Yes, sir.

Q. Now, Mr. Simonson, handing you Plaintiff's 92, state if that is your work papers concerning your summary for the year 1949? A. That is.

Q. And that is what you made up as a result of the exhibits that we have just been examining, the three that have been admitted and the five that have just been identified?

A. That is correct. And may I explain?

Q. Yes.

A. On this one with reference to C. O. Ackley there is some of Mr. Blankenship's writing on that. I checked those figures.

Q. Yourself? A. Yes, myself. [345]

Q. And this summary is similar to the summaries that have been admitted for the years 1950, 1951, 1952 and 1953? A. That is correct.

Testimony of Paul Simonson.)

Q. And were they made in connection with 70 which is the gross receipts of Mr. Palermo?

A. Yes.

Mr. Bantz: Your Honor, at this time I will offer in evidence for the year 1949, Plaintiff's Exhibits for Identification 15, 34, 46, 78, 80, 92. If I may a moment—I might have left one out here, just a moment.

The Court: Those are the same ones you mentioned in your previous question to Mr. Simonson?

Mr. Bantz: Yes, they are, your Honor.

The Court: How about 43, Mr. Bantz, it isn't in evidence.

Mr. Bantz: Your Honor, may I have back—or Mr. Taylor, the one that has the receipts in the bank that I just gave to you that we are going to block out.

The Court: The reason I asked you about that, it isn't admitted.

Mr. Bantz: Yes, I know, and he just called that to my attention. Oh, your Honor, I have 43 and it was covered up and I showed it to him, I am sorry.

The Court: I see. Do you wish to offer 43, then?

Mr. Bantz: Yes, I do wish to offer 43 because it is [346] part of the summary that Mr. Simonson has drawn. I wish to offer it on the same basis that I offered 1948, for similar transactions and omissions for those years, and not to the current intent of the years in issue here.

(Testimony of Paul Simonson.)

Mr. Moore: With reference to the offered exhibits for identification, your Honor, our objection goes to 15, 34, 43, 46, 78, 80, 92, on the basis that the same is immaterial, that the same do not have any tendency to prove that which Mr. Bantz claims that they would, and in addition with reference to Exhibit 78 for Identification, insufficient identification.

The Court: Let me see, 78 is a check identified by Everett Thoren of the Lyle Lumber Company, is that it?

Mr. Bantz: Yes, your Honor. That was by Mr. Thoren from the man who took over the Lyle Lumber Company.

The Court: Oh, I see.

Mr. Bantz: And had the books and records of the Lyle Lumber Company.

The Court: Oh, yes, I remember. 15, 34, 43, 46, 78, 80, 92 will be admitted. And I simply call your attention to the fact that these pertain to the year 1949 and that is a year prior to the indictment, and I call your attention that the limited purpose for which they are admitted will apply and be considered by the jury. All right. [347]

(Whereupon, said documents were admitted in evidence as Plaintiff's Exhibits No. 15, 34, 43, 46, 48, 80 and 92.)

Mr. Bantz: If I may, your Honor, I will read from the Exhibit 92.

The Court: All right.

Mr. Bantz: This concerns the year 1949 and con-

Testimony of Paul Simonson.)

erns receipts from the Lyle Lumber Company paid to Mr. Palermo and the amount was \$22,929.20 for a total of twelve checks. Seven checks were recorded in his books and records, totaling \$19,000.00. There were five checks not recorded in his books and records, totaling \$5,129.20, and there was deposited in the bank eleven checks and the only one not deposited was a check in the amount of \$98.44.

Q. Mr. Simonson, referring to this, what figure is this one, please?

A. That's—I am sorry, right now I can't—

Mr. Bantz: It is a matter of deposit in the bank account. If your Honor please, when we are through we will check them again to be sure that it is correct. It is kind of erased and I think I can't tell now.

The Court: All right.

Mr. Bantz: Referring again to Plaintiff's Exhibit 92, from the Columbia—no, the S. D. S. Lumber Company, Mr. [348] Palermo received a check in the amount of \$125.80, and the check wasn't recorded in the book and not deposited in the bank. With reference to the account with C. O. Ackley for the year 1949, Mr. Palermo received six checks in the amount of \$7,535.36. He recorded in his books \$5,392.00. He did not record in his books and records \$2,143.36, and he deposited in the bank account all six checks, totaling \$8,535.36. In the year 1949, he received from Stevenson Plywood Company a total of five checks amounting to \$2,367.65. He recorded in his books and records \$1,879.65 and he did not record in his books and records \$488.00. He depos-

(Testimony of Paul Simonson.)

ited in the bank \$2,266.65 and he did not deposit \$101.00 in his account. During the year 1949, he dealt with the Columbia-Hudson Lumber Company and he received a total of twenty checks which amounted to \$4,087.16—I believe that is eighteen checks amounting to \$4,087.16. He recorded in his books \$1,267.55 and he did not record sixteen checks amounting to \$2,819.61. He deposited eight checks in the amount of \$2,763.95. He did not deposit ten checks in the amount of \$1,323.21.

Q. Mr. Simonson, handing you Plaintiff's Exhibit 66 for Identification, have you seen that exhibit before? A. I have.

Q. And generally what is that exhibit?

A. That is a net worth trace for the years 1949 to 1953.

Q. What do you mean by a net worth [349] trace?

A. It is a computation of income based on a net worth, that is adding up his assets and liabilities and determining the increase in his net worth each year.

Q. Now, you mean that that is determined from one calendar year to the next calendar year?

A. That is correct.

Q. Well, does that show on that exhibit year by year?

A. It does for the years 1949 through 1953.

Q. And where did we receive that exhibit?

A. Mr. Blankenship received this from Mr. Moore, as testified to yesterday.

Q. That was in connection with the power of at-

Testimony of Paul Simonson.)

orney that we have? A. That is correct.

Q. Or that he had, pardon me. Now, have you examined that exhibit as to generally the figures that we have that are now in evidence and the bank statements concerning the year 1949 up to date?

A. Yes, I have.

Q. And how does that exhibit generally compare with what our figures would show, and I don't mean to the dollar but within a few dollars of each other?

A. Generally for the years 1952 and 1953 I think this would be reasonably accurate net worth of Joe Palermo.

Q. Now, is there any discrepancy in there that you can put [350] your finger on or is it fair in all respects?

A. There is omitted from the net worth at the end of 1952 and 1953 the savings account in the Bank of Stevenson now in evidence.

Q. And what did that amount to?

A. Approximately \$10,000.00, plus the interest accrued on the account.

Q. Now, I take it that this sheet is what an accountant makes up for a net worth, is that right?

A. This is an accountant's work, yes.

Q. Now, what was the net worth that he started with in 1949? A. In 1949 it is \$19,208.80.

Q. And what was the net worth at the end of 1949? A. \$26,811.07.

Mr. Moore: Is 66 an identification or in evidence? I don't know whether it is or not. Did you say that it was?

(Testimony of Paul Simonson.)

Mr. Bantz: It hasn't been admitted. Yes, 66 has been admitted.

Q. What is the net worth at the end of 1949?

A. \$26,811.07.

Q. Now, starting with the year 1950, what does he show, what is the net worth for that year of 1950?

A. The net worth at the end of 1950 is \$57,211.31.

Q. Now, how much increase is there between the years 1949 and 1950? [351]

A. \$30,400.24.

Q. Now, what is the net worth in the year of 1951?

A. The net worth shown here is \$93,933.46, at the end of 1951.

Q. And what is the net worth increase then for the year 1951?

A. \$36,722.15.

Q. All right. Now, in 1952 what does that exhibit show as his net worth for that year?

A. \$119,360.41.

Q. And what was the increase for the year 1952?

A. \$25,426.95.

Q. Now, as far as you are concerned is that a correct statement of his net worth at that time?

A. At the end of 1952 there was a savings account in the Bank of Stevenson with approximately \$10,000.00 in the account which is not reflected on this net worth.

Q. There was more than \$10,000.00?

A. There was a little bit more. \$10,000.00 plus interest accrued.

Q. In other words, you are assuming that this is

(Testimony of Paul Simonson.)

he correct net worth with the execption then of an item of \$10,000.00, or adding the \$10,000.00 what is the net worth at the end of 1952?

A. Approximately \$129,000.00, little bit over \$129,000.00.

Q. What then would be the increase in the net worth from the [352] year 1951 to the end of 1952?

A. Approximately \$35,400.00.

Q. Now, what is the net worth at the end of 1953?

A. \$138,084.44.

Q. All right, now, with reference to that how much was the increase between 1952 and 1953 as shown on this statement?

A. \$18,724.03.

Q. All right, was the \$10,000.00 still in the bank in 1953?

A. Yes.

Q. At the end of 1953?

A. It was.

Q. And is it reflected on this net worth statement?

A. No, it isn't.

Q. Then, what would the net worth statement be at the end of 1953 if the \$10,000.00 were included?

A. \$148,084.00 plus the accrued interest on the savings account.

Q. Then, if the figure was \$148,000.00 plus dollars, what would be the increase from the end of 1952 to the end of 1953?

A. It would be the same statement as shown here except with the accrued interest in the bank account for 1953, it would be an increase of \$18,724, plus the accrued interest.

Q. Let me ask you this then, if the figure of

(Testimony of Paul Simonson.)

\$138,000.00 is increased \$10,000.00, does not the net worth for the year [353] increase \$10,000.00?

A. Not for the year before.

The Court: You counted it the year before.

Mr. Bantz: That is what I wanted to bring out.

Q. In other words, in your figure here you have not counted it for the year before?

A. In the computation I was assuming that figure in the year of 1952 would be increase.

Q. All right. In other words, there is a \$10,000.00 difference between the net worth shown in there than what there would be if the \$10,000.00 is added?

A. That is correct.

Q. Now, does that net worth trace show what he reported for his income starting with the year 1949 through 1953? A. It does.

Q. All right, what does he show for his income for the year 1949? A. Reported or indicated?

Q. No, reported.

A. Reported income was \$1,824.64 in 1949.

Q. Now, there is the item of "Indicated Net Income"; what does that mean?

A. That is indicated income by making the net worth trace that it would be \$9,602.27.

Q. All right, then what is the difference between what he [354] reported and what this sheet shows was his income for the year 1949?

A. \$7,777.63.

The Court: Pardon me, you are giving the net income and not the tax, on that figure, that is the net income and not the tax?

(Testimony of Paul Simonson.)

Mr. Bantz: Yes.

A. Yes.

Q. Do you understand that now? A. Yes.

Q. Now, for the year 1950 what income was reported under this particular sheet?

A. \$4,553.00.

Q. Is that the same figure that is on his income tax return? A. That is correct, yes.

Q. Now, according to his net worth statement, what is the indicated net income for the year 1950?

A. \$35,225.12.

Q. And what is the difference for that year?

A. \$30,672.12.

Q. Now, for the year 1951 what was his reported income for that year? A. \$13,378.81.

Q. And what does his figures on the net worth trace show as his indicated net income for that year?

A. \$46,740.15. [355]

Q. And what is the difference for that year?

A. \$33,361.34.

Q. Now, according to this over here the last figure you read was \$46,740.15, and that is indicated net income and not gross earnings?

A. Yes, it is indicated net income.

Q. Now, referring to the year 1952 what income was reported in accordance with this net worth trace here? A. \$12,791.22.

Q. And what does this show was the indicated net income for the year 1952? A. \$42,937.37.

(Testimony of Paul Simonson.)

Q. And what is the difference?

A. \$30,146.15.

Q. Now, for the year 1953 what was reported for this year?

A. \$17,725.32.

Q. And what was the indicated net income?

A. \$32,966.94.

Q. And what is the difference in the year 1952?

The Court: '53.

Q. '53, pardon me. A. \$15,241.62.

Q. Mr. Simonson, there is actually a difference between the allegations in the indictment of figures of money than there is in this net worth, is that correct? [356]

A. That is correct.

Q. Which is the greater, do you recall; which is the highest?

A. The net worth shows a greater difference.

Q. The net worth shows a greater difference?

A. Yes.

Q. Were the items that we have been discussing and that are in evidence in accordance with the indictment or with the net worth?

A. The items in evidence are in accordance with the indictment.

Q. And do the figures in the indictment generally check with what the evidence has produced in here and in accordance with your summaries?

A. Yes, sir.

Q. Are they quite close?

A. I think that they are exactly right.

Q. Handing you Plaintiff's Exhibit 67, which has been admitted, what is that, Mr. Simonson?

Testimony of Paul Simonson.)

A. This is——

Mr. Bantz: Just a moment. Your Honor, would you mind my standing here. I have only one copy and I need to ask him these questions.

The Court: That is all right.

Q. What is this now?

A. This is a schedule of Differences between Reported Net [357] Income and Indicated Net Income.”

Q. Tell me what that means.

A. The accountant has prepared a schedule of the total receipts reported, the indicated receipts, and the increase or decrease in receipts for that year. The schedule also includes the expenses reported, the indicated expenses per his analysis and the increase or decrease in those expenses.

The Court: What number is that, please?

Mr. Bantz: That is 67, your Honor.

A. That is for the years 1951, 1952, and 1953.

Q. Now, is this the same thing we were discussing with the other exhibit?

A. It bears a relationship to it but it isn't the same, and this is actually going into the indicated receipts and to the expenses and determining where it goes entirely by the return and what is indicated and the net worth is not used in making this compilation.

Q. In other words, the indicated matter that is shown on Exhibit 67, would it be right to say that it is from the records that are probably in evidence that he obtained checks for during those years?

(Testimony of Paul Simonson.)

A. It would not be possibly based upon the records in evidence. Apparently the expenses were determined from some sort of checks and invoices and the receipts it does [358] not indicate on here where the receipts figure was obtained.

Q. Now, I just want to ask you this: In the matter we have in the indictment are we challenging anything as to the expenses?

A. No, we are not.

Q. Have you accepted in your statement the expenses of Mr. Palermo?

A. The expenses shown on the returns are accepted for our compilations here.

Q. In this case?

A. Yes, in this case.

Q. Now, I am reading here from the year——

The Court: Pardon me, it is not clear to me and maybe not to the jury where this document came from. Is this from the defendant's attorney?

Mr. Bantz: Yes, from the defendant's attorney.

Q. In the year 1951 it says reported \$98,178.22 what does that mean?

A. That means gross receipts reported on the income tax return.

Q. And it says Indicated \$119,398.79, what does that mean?

A. It means that receipts should be reported in that figure.

Q. \$119,000.00? A. Yes. [359]

Q. And you have Increase (Decrease) in Net \$21,220.57. Is that an increase or decrease?

(Testimony of Paul Simonson.)

A. That is increase because there is no parentheses around it.

Q. In 1951 there is an increase of \$21,220.57?

A. In receipts.

Q. In receipts? A. Yes.

Q. Now, for the Year 1952, it shows reported \$97,952.27. Now, what is that according to the reported income?

A. That is indicated by the tax returns.

Q. By the tax returns? A. Yes.

Q. All right. The indicated for the Year 1952 is \$112,680.76, what is that?

A. That would be what should be shown on the tax returns according to this.

Q. According to their own calculations?

A. Yes.

Q. Then, there is an increase of \$14,728.49?

A. That is correct.

Q. Now, for the Year 1953 it shows reported \$102,901.72, indicated \$113,888.72, with an increase there in the amount of \$10,987.00?

A. That is correct. [360]

Q. Now, that means that it indicates from their records when they checked them it should have been increased by \$10,987.00?

A. That is right.

Q. Now, on the bottom of Plaintiff's Exhibit 67 it says, "Net Profit (logging)" which is in parentheses and it says for the year 1951, reported \$13,-319.81, what does that mean?

(Testimony of Paul Simonson.)

A. That is the net profits from logging shown on the tax return.

Q. For the Year 1951? A. Yes.

Q. Then it says "Indicated." Am I right, is that still the same column? A. That is correct.

Q. Indicated \$44,834.55, what does that mean?

A. That is the figure which should be reported as indicated net profit for Mr. Palermo from logging in 1951.

Q. And it shows the difference of \$31,514.74?

A. Correct.

Q. For the Year 1952 it shows under "Reported" \$12,173.87. Now, that is on the return?

A. That should be the figure on the return, yes.

Q. Indicated \$40,812.43. Indicated means what it should have been? [361] A. Yes.

Q. According to these figures?

A. Yes, according to these figures.

Q. And then it shows an increase of \$28,638.56, is that correct? A. Yes, that is correct.

Q. Now, that is the increase over what was actually reported on the return?

A. That is correct.

Q. In the Year 1953 it shows Reported \$19,625.32, the indicated shows \$30,967.70 or an increase of \$11,342.38, is that correct?

A. That is correct.

Q. Handing you Plaintiff's Exhibit 25 for identification, have you seen that before?

A. I have.

Q. And what does that purport to be?

(Testimony of Paul Simonson.)

A. This is an application for loan at the Security State Bank at White Salmon.

Q. And it is for Joe Palermo?

A. Yes, for Joe Palermo.

Mr. Bantz: May I have the income tax return for 1948. I believe it is Exhibit No. 1.

Q. Handing you Plaintiff's Exhibit No. 1 for the Year of 1948, the income tax return, what does it show the gross [362] earnings of Mr. Palermo were for that year?

A. The adjusted gross income reported on this return is a loss of \$6,040.68.

The Court: For what year is that?

Mr. Bantz: It is for '48, your Honor.

The Court: Yes, '48.

Q. Does this show his annual income for the Year 1948?

A. Yes, it does. It shows "annual income or salary" and this is dated March 3, 1948.

Mr. Bantz: Your Honor, I am going to offer Plaintiff's Exhibit 25, which is a statement identified from the bank official at White Salmon. It is dated March 3, 1948, and I am offering it only for the purpose that it substantiates for original net worth figures and showing that his assets by his own statement run higher than what he states in here, and I want it for only that limited purpose.

The Court: Have you seen it, Mr. Moore?

Mr. Moore: Well, your Honor, we have one computation which we made subsequently and we have additional computations as far as the net

(Testimony of Paul Simonson.)

worth is concerned. I submit that Plaintiff's Identification No. 25 being an application for a loan at a bank is probably as a practical matter not based upon the same facts that the Government would contend that a proper net worth statement should be made, and in addition to that as counsel has already asked the witness with reference to [363] anticipated income, that is already shown that Mr. Palermo went into the logging business in the Fall of 1947, and in March 3rd of 1948, in trying to obtain a loan from the bank, he apparently makes an estimate of what he is going to make in 1948.

The Court: I think he is offering it as a basis as to net worth.

Mr. Bantz: Yes, net worth.

The Court: And until the contrary is shown, that a man is telling the truth about his assets.

Mr. Moore: The net worth, as I understand it, according to the law, is not based upon market value.

The Court: Well, I think there is some evidence. I will admit it for what it is worth. That is number 25?

The Clerk: Yes, sir.

(Whereupon, said statement was admitted in evidence as Plaintiff's Exhibit No. 25.)

Q. You have some computations there, don't you, Mr. Simonson, computations of tax?

A. Yes, I do.

Mr. Bantz: May I have those identified or

(Testimony of Paul Simonson.)

marked for identification. Would you mark those separately, please, Mr. Taylor. [364]

Mr. Clerk: 93, 94, 95, 96, your Honor.

The Court: Are there four of them?

The Clerk: Yes, sir.

Q. Mr. Simonson, handing you Plaintiff's Exhibit for Identification 93, was that statement prepared by you?

A. That was prepared by me.

Q. Now, Mr. Simonson, in our indictment we allege that the defendant well knew he owed back taxes and we computed certain figures that he owed taxes on in our indictment, and there has been exhibits admitted in evidence from which we computed our income tax for the Years of 1950, 1, 2 and 53? Is that correct?

A. That is correct.

Q. Now, have you had an opportunity to compute what the tax would be, the additional tax would be for Mr. Palermo to pay, from the exhibits that have been admitted in evidence, if his income tax return had been correct?

A. I have.

Q. Would you explain how you make a computation of tax for a year, any year, what is your procedure?

A. I start with the adjusted gross income and make additions to the adjusted gross income as indicated by the evidence. I allowed the deductions which are claimed in this particular case, the standard deductions used most years, and it was allowed, and the exemptions are allowed, and [365]

(Testimony of Paul Simonson.)

the tax then computed by applying the tax rates according to the law.

Q. Now, handing you Plaintiff's Exhibits 4, 5 and 6, please look at those and at Plaintiff's Identification 93, which pertains to the Year of 1950, what was your starting base that year?

A. I started with the adjusted gross income per return shown in Exhibit 3, \$4,553.00.

Q. And then to that you put the additional income?

A. I added the additional income per the summary to which I testified and which is in evidence of \$16,873.70.

Q. Now, in the computation of this tax for the Year 1950, did you use the generally accepted accounting procedure and practice for computing this tax?

A. I did.

Q. And you have done this in the past, I assume, Mr. Simonson?

A. I have.

Q. And what was the amount of tax that you came up with for that year?

A. The income tax liability for Joe and Bertha Palermo for '50, \$4,347.90. The income tax liability shown on the return was \$403.00. Additional tax of \$3,944.90.

Mr. Bantz: Your Honor, I will offer at this time Plaintiff's Exhibit 93 for Identification for the purpose of showing computation of tax in accordance with our indictment. [366]

Mr. Moore: Could I inquire?

The Court: Yes.

(Testimony of Paul Simonson.)

Mr. Moore: With reference to all four of these, to get it out of the way, when you say you add additional income per summary you are referring to your summaries which you gave before?

A. My summaries——

Mr. Moore: Your summaries which you gave before which showed income which had not been included in the records?

A. On the records, yes.

Mr. Moore: In other words, receipts which were income?

A. Yes.

Mr. Moore: I have no objection.

The Court: Admitted.

(Whereupon, said 1950 computation of tax was admitted in evidence as Plaintiff's Exhibit No. 93.)

Q. Now, Mr. Simonson, for the Year 1951, did you make a computation of the tax?

A. I did, sir.

Q. Did you use as a starting point the income tax return of 1951 for Mr. Palermo?

A. Yes, I did.

Q. What was that starting point? [367]

A. Adjusted gross income as shown on the return of \$13,378.81.

Q. And what tax was shown on his return that he owed?

A. He showed on his return that he owed tax of \$2,408.28.

(Testimony of Paul Simonson.)

Q. I am assuming that you again used the generally accepted practice of accounting procedure in determining the computation of tax for the Year 1951, is that correct? A. I did. I did.

Q. And was it from the evidence that has been adduced on this trial? A. Yes, it was.

Q. And again did you come up with the additional tax due and owing by Mr. Palermo for the Year 1951?

A. The income tax liability for the Palermo return of 1951 is \$10,862.46. That is an additional tax of \$8,454.18.

Mr. Bantz: I will offer Plaintiff's Exhibit 94 for identification in evidence.

Mr. Moore: No objection.

The Court: It will be admitted.

(Whereupon, said 1951 computation of tax was admitted in evidence as Plaintiff's Exhibit No. 94.)

Q. Now, referring to the Year of 1952, Mr. Simonson, did you make a computation of tax for that year? A. I did. [368]

Q. And did you start as a basis with the income tax return of Mr. Palermo for that year?

A. Yes.

Q. What is the figure you started with for that year?

A. I started with the adjusted gross income, Exhibit 5, of \$12,791.22.

Q. And how much was shown was paid by Mr.

(Testimony of Paul Simonson.)

Palermo for the Year 1952? A. \$2,450.90.

Q. Did you again use the generally accepted practice and procedure of accounting in the computation of tax for the Year 1952 in accordance with the evidence that has been admitted in this trial? A. Yes, I did.

Q. And what is the computation of additional tax due in accordance with the figures before you?

A. \$15,898.58, that is additional tax that should be paid of \$13,447.68.

Mr. Bantz: I will offer Plaintiff's Exhibit 95 into evidence.

Mr. Moore: No objection.

The Court: It will be admitted.

(Whereupon, said 1952 computation of tax was admitted in evidence as Plaintiff's Exhibit No. 95.) [369]

Q. Now, referring to the Year 1953, did you make a computation of tax for that year?

A. I did.

Q. Did you as a starting point use a figure that is shown on the income tax return of Mr. Palermo?

A. Yes.

Q. For that year? A. I did.

Q. What was that figure?

A. The adjusted gross income per return, Exhibit 6, is \$17,725.32. And may I explain, sir?

Q. Yes.

A. On the 1953 income tax here on Schedule "C"

(Testimony of Paul Simonson.)

there was a computation error of \$1,000.00 on the return, reflecting on his computation of the tax.

Q. You took it from him or gave it to him?

A. The computation showed \$1,000.00 more. Now, this return reflected \$1,000.00 more income than would otherwise be shown on the tax return.

Q. Then, what figure do you show that he paid tax on, the amount that he showed as income for the Year 1953?

A. He showed income tax liability on his return of \$4,026.60.

Q. All right. Now, did you in the generally accepted accounting procedure compute the tax in accordance with the evidence that has been admitted in this trial to show [370] what figure if properly computed he would have to pay for the Year 1953?

A. Yes, I did.

Q. And what is that total figure and then take away the amount that he has paid?

A. The income tax liability for Joe and Bertha Palermo for 1953 was \$9,458.96 and an additional tax of \$5,432.36.

Q. Now, Mr. Simonson, do you recall from the figures that were in the indictment and the figures that you have submitted in the computation of tax whether they are generally the same or exactly the same?

A. I think that they are exactly the same.

Mr. Bantz: I will offer at this time Plaintiff's Exhibit 96 which is the computation of tax for 1953.

(Testimony of Paul Simonson.)

Mr. Moore: No objection.

The Court: Admitted.

(Whereupon, said 1953 computation of tax was admitted in evidence as Plaintiff's Exhibit No. 96.)

Q. One more question, Mr. Simonson, the computation you took of income tax wasn't based upon Plaintiff's Exhibit 66, the net worth statement, that has been introduced, but on the specific items, is that correct? A. That is correct. [371]

Q. When I say "specific items" I mean the items that are in evidence in this trial?

A. That's right.

Mr. Bantz: Your Honor, I am quite sure we are going to rest and it is probably too late to start cross-examination, but I would like to have the opportunity over night to check my file to be sure I have got all of my exhibits admitted and I have everything in. To my knowledge, I have no other witnesses and I would like to talk for a few minutes with Mr. Simonson, and that would give counsel an opportunity over night to prepare for his cross-examination.

The Court: Yes, all right.

Mr. Bantz: It is only ten minutes to the time for adjournment.

The Court: I am going to excuse the jury until ten o'clock tomorrow morning, and perhaps you would like to know, ladies and gentlemen of the jury that I do not propose to hold court on Satur-

(Testimony of Paul Simonson.)

day, and so when you get through tomorrow afternoon you will be excused until Monday Morning, and you will have Saturday and Sunday to rest up. You will be excused until tomorrow morning at ten o'clock.

(Whereupon, the following proceedings occurred in the absence of the jury:)

The Court: I thought I would take this opportunity to say that counsel have the right to present requested instructions [372] to the Court, but I have quite a complete set of fairly recent income tax evasion cases similar to the charge here. I think that the last one I had was the Walters case, and I have tried to draft the instructions in accordance with the recent decisions of the Circuit Court of Appeals of the Ninth Circuit, and so I just wanted to tell you that, and so if you don't feel that you want to do a lot of work on the proposed instructions, it will not be necessary as far as I am concerned.

Mr. Bantz: Your Honor, I have some proposed instructions. What are you going to use on wilfulness, I would like to know? Are you going to use the same one you used in the Walters case?

The Court: I had that in mind. I think the Walters case was after the Block and later decision of the Supreme Court. * * *

(Whereupon, after discussion of the proposed instructions and law of the cases involved, court was adjourned.)

No. 15809

United States
Court of Appeals
for the Ninth Circuit

JOE PALERMO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 325 to 580)

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division.

FILED

JAN 7 1956



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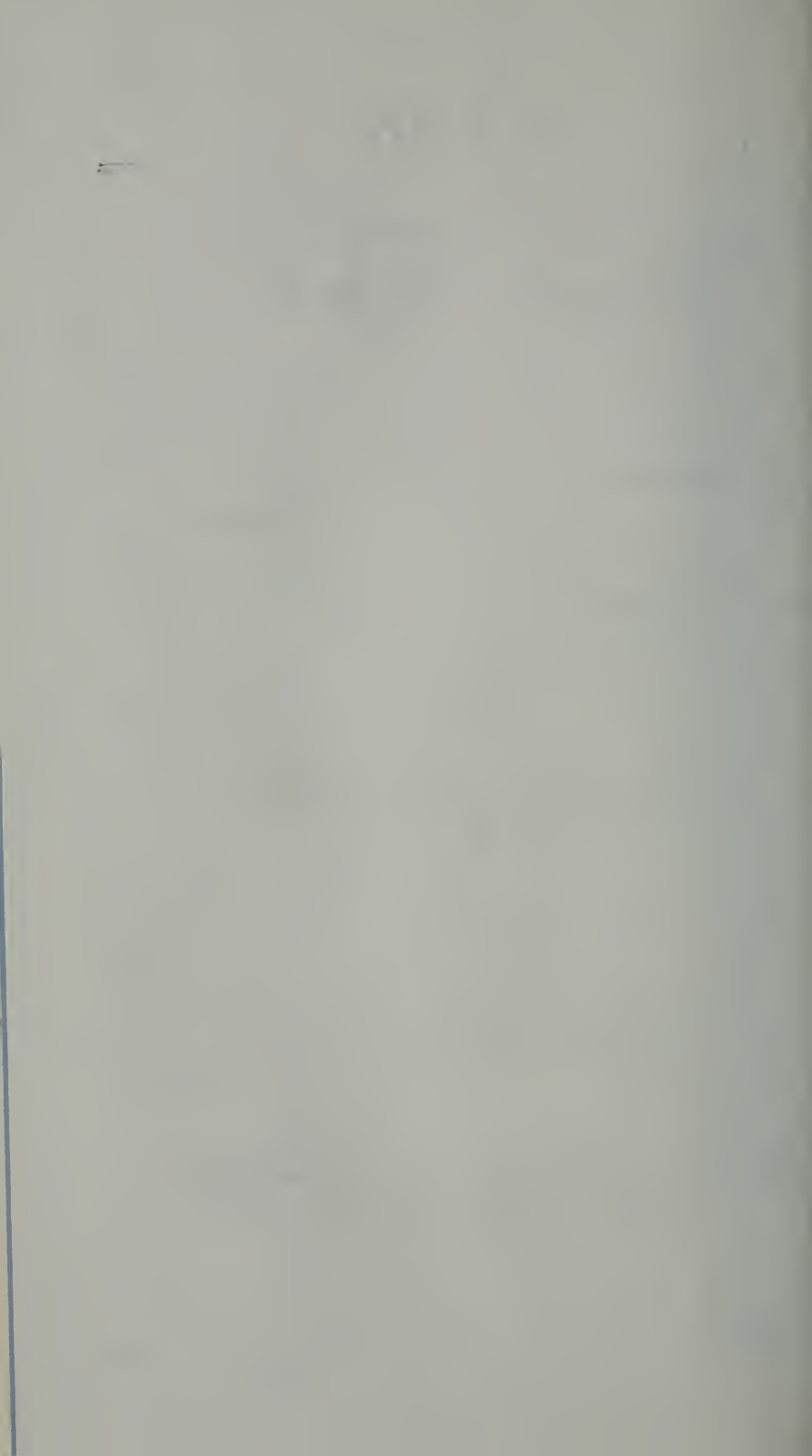
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Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division.



(Testimony of Paul Simonson.)

July 26, 1957—10:00 A.M.

The Court: You may proceed.

Mr. Bantz: May I have Plaintiff's Exhibits 66, 88, 23, 10 and 13. Your Honor, I have just a few questions of Mr. Simonson and I will be finished here. [373]

The Court: Yes, all right.

Q. Mr. Simonson, handing you Plaintiff's Exhibit 23, would you state—now, this is the ledger account at the Security State Bank of White Salmon, which is now the National Bank of Commerce, is that correct? A. That's correct.

Q. Would you look on the exhibit before you, which is Plaintiff's Exhibit 23, and tell me the balance, the cash balance in the account of Mr. Palermo for the date of January 1, 1950?

A. The nearest I have on this ledger sheet to that is December 30, 1949. The balance is \$8,800.07.

Q. And what is the balance on December 31, 1950?

A. The closest balance I have is December 29, 1950, and the balance then is \$21,114.31.

Q. Now, what is the balance on December 31, 1951?

A. The balance in December 31, 1951, is \$44,699.97.

Q. And what is the balance for the year ending December 31, 1952?

A. The balance on December 31, 1952, is \$57,349.16.

(Testimony of Paul Simonson.)

Q. And what is the balance ending December 31, 1953?

A. The balance on December 31, 1953, is \$64,-487.37.

The Court: What bank is that, Mr. Simonson?

A. The National Bank of Commerce, formerly the Security State Bank. [374]

The Court: Of White Salmon?

A. White Salmon.

Q. Now, handing you Plaintiff's Exhibit 13, will you state what that exhibit is?

A. This is ledger sheet to the checking account of Joe Palermo for the National Bank of Stevenson.

Q. Now, referring to Plaintiff's Exhibit 13, will you state what it shows as the cash balance for the Bank of Stevenson for the Year 1950?

A. The balance in December 30th, 1950, was \$10,665.73.

Q. Now, is there a balance on there for the year ending December 31, 1951?

A. There is not.

Q. What is the final—

A. Excuse me, sir—no. No, there is not.

Q. When is the final closing date of that account then?

A. January 9, 1951, and then February, '52, the account was reopened.

Q. Well, now, in Plaintiff's Exhibit 13, is there a bank balance in the Year of 1952?

A. There is.

(Testimony of Paul Simonson.)

Q. And what is the last date in 1952 on that exhibit that shows a bank balance?

A. December 23, 1952.

Q. And what is the bank balance of that [375] date?

A. \$1,857.60.

Q. Is there any balance for the Year of 1953?

A. There is a balance, yes, sir.

Q. And what is the balance of the closing date?

A. The last date with the balance in 1953 is February 19, 1953, \$67.09.

Q. Now, handing you Plaintiff's Exhibit 10, would you please examine that and state what that exhibit is?

A. This is a deposit ticket and ledger sheet to a savings account of Joe and Bertha Palermo in the Bank of Stevenson.

Q. And what years does it cover, Mr. Simonson?

A. It starts August 20, 1952, and goes to January 3, 1956.

Q. What is the starting balance on that account with the date?

A. The starting balance, August 20, 1952, for \$10,000.00.

Q. All right, on December 31, 1952, what is the balance?

A. \$10,066.66.

Q. And what is the balance on December 31, 1953?

A. \$10,268.99.

Q. Handing you Plaintiff's Exhibit 66, would you please state what that is?

A. That is the net worth trace of Joe and Bertha Palermo for the Years 1949 through 1953.

(Testimony of Paul Simonson.)

Q. Yesterday you testified as to the Year of 1952, there being a difference of \$10,000.00? [376]

A. That is correct.

Q. Do you recall that?

A. That is correct.

Q. Now, Mr. Simonson, when you first find out that the \$10,000.00 was in the Bank of Stevenson, which is shown in Plaintiff's Exhibit No. 10, when did you first find out about that?

A. About March, 1955.

Q. And where was it that you found out about it?

A. At the Bank of Stevenson.

Q. And in what form was that \$10,000.00?

A. In the savings account at the Bank of Stevenson.

Q. And that is the \$10,000.00 we are talking about in Plaintiff's Exhibit 10?

A. That is correct.

Q. Had you at any time prior to that date known of the \$10,000.00 in the savings account?

A. No.

Q. At no time? A. No.

The Court: Is that 1955?

A. Yes.

The Court: Did you give the month?

A. March, 1955.

Q. But the \$10,000.00 we are talking about concerns the [377] Years 1952 and 1953?

A. Yes, it does.

Q. Handing you Plaintiff's Exhibit 88, would you please state what 88 is?

A. This is summary of receipts of Joe Palermo

(Testimony of Paul Simonson.)

for the Year 1952, showing total checks, total recorded in the books, not recorded, deposited and not deposited.

Q. Mr. Simonson, can you tell from Plaintiff's Exhibit 88, insofar as the evidence is concerned, how many customers or individuals or companies did Mr. Palermo deal with on a business basis there during the Year of 1952 concerning his logging operations? A. Twelve. Twelve.

Q. Now, that is twelve individuals or companies?

A. Yes, twelve individuals or companies.

Q. All right, how many of those individuals and companies was on his books and records?

A. He recorded income from five of those customers in 1952.

Q. Well, then, there was seven that wasn't recorded? A. That is correct.

Mr. Bantz: You may examine, Mr. Moore.

Cross-Examination

By Mr. Moore:

Q. Mr. Simonson, on your direct examination you have testified to a bank account at Stevenson in 1950 and 1951 and a [378] savings account at Stevenson thereafter? A. That is correct.

Q. And you have testified with reference to when you learned of the existence of that savings account? A. I have.

Q. You have also testified that exhibits—could I have 50 and 51—you have also testified with reference to 86, 87, 88 and 89 being your summaries?

A. Yes, sir.

(Testimony of Paul Simonson.)

Q. And stated that these were the summaries—these are copies of summaries which you submitted to your superiors? A. That is correct.

Q. Following the completion of your investigation of Mr. Palermo? A. That is correct.

Q. Are these summaries the only reports that you submitted to your superiors? A. No.

Q. Did you submit reports with reference to the savings and checking accounts at Stevenson?

A. Yes, I did.

Q. May I see copies of those reports, if you have them? A. I do not.

Mr. Bantz: Your Honor, I am going to object to anything that he has not—maybe we better dismiss the jury. [379]

The Court: Yes. The jury will step outside.

(Whereupon, the following proceedings occurred in the absence of the jury:)

Mr. Bantz: I would object, your Honor, to him asking for any report that he made with the \$10,000.00, that he made to his superior, on the grounds that he has testified that his summaries concerning that have been made from the evidence that in trial, and there is no showing that there is any other matter that is concerned here. His veracity or truthfulness is apparently not at issue, and it is a matter of the record here. I could see nothing that we should be turning over unless he has testified to something on direct examination. A matter that he reports to his superior certainly is not in issue here at this time.

(Testimony of Paul Simonson.)

The Court: Well, this \$10,000.00 item, I assume that the purpose of showing that it wasn't discovered by Mr. Simonson until March, 1955, since it wasn't disclosed to him, the inference would be that it would be covered up by the defendant and he was holding it out.

Mr. Bantz: No.

The Court: You are entitled to point out to the jury he was in good faith, even at the time he turned in the net worth statement, and that he still held out this \$10,000.00 account at the Stevenson Bank, and if he held it out of his report counsel is entitled to say that Mr. Palermo told him [380] so it could be in his report and he may have excluded a report of it, and he may have said that Mr. Palermo told him about the \$10,000.00, and he had a right to go down and see, and counsel is entitled to bring that out. It is a matter of credibility, very much a question of credibility.

Mr. Bantz: All right, is it limited to the \$10,000.00 that he is asking about?

The Court: Well, as to these other matters, I don't know whether Mr. Moore intends to ask for all of his reports made in the course of his investigation or not. This question at this time is limited to the savings account.

Mr. Moore: I am asking for any report in which any reference is made to the Stevenson checking or savings accounts, with reference to its existence or nonexistence.

The Court: Why the checking account?

(Testimony of Paul Simonson.)

Mr. Moore: Because he has already tied it in to show the Stevenson Bank checking account was transferred to the savings account in the amount of \$10,000.00.

The Court: Yes, I remember it was transferred from the checking account to the savings account. Yes, I see. I think while it isn't involved in your present question you may as well bring it out in the open now as to whether you intend to ask for other reports concerning these other matters that he has testified to, and I think Mr. Bantz' objection is there, that he was only making deductions by [381] rearranging the data that you gave him in acting for the defendant, and so it would be immaterial what reports he made, unless you want to take the position that he didn't actually receive them or they were different than what he received.

Mr. Bantz: Yes, that is right. I think his testimony has been limited and I have tried to limit it to matters given us by the defendant or what has been put in evidence here in connection with the trial and admitted. Now, he drew his summaries from that. Now, in the case of the \$10,000.00, we will submit the report. I am assuming that there was a report. He has stated that there has been one and we will get that to you.

The Court: Checking and savings account in the Stevenson Bank, is it—what is the name of that bank?

Mr. Bantz: Stevenson Bank.

The Court: Is that a National or State Bank?

(Testimony of Paul Simonson.)

A. State bank.

Mr. Bantz: Now, if he is going to do this, we want to argue this. I don't want him to take the whole file up and start reading from it. Your Honor, I am not that naive and we will take out of that file what you are asking us to do now.

Mr. Moore: I don't think that I want any others, your Honor, because I think that the one thing I want to question him about is with reference to an actual statement [382] which he made, and I feel sure that on cross-examination we can clear it up.

Mr. Bantz: May we have five minutes to look at our records?

The Court: I will just recess subject to all. I think I will give you a recess and give you a chance to have Mr. Moore pick out what he wants now, and I think it is clear. I think it is the checking and savings account in the Stevenson State Bank, and give Mr. Moore a chance to look them over and make up his mind what he wants to use within reason, and I don't think they are too voluminous.

Mr. Bantz: Let me ask you this, your Honor, that one page refers to one and one to the other. May I take off one part so I can give him what he wants?

The Court: Yes, you can paste something over the other.

Mr. Bantz: Thank you.

The Court: I think that the defense counsel

(Testimony of Paul Simonson.)

might agree to the same arrangement that we had in the McDaniels case. Fortunately, we weren't called upon to instruct there. And we had the understanding that if there were mixed materials and interwoven matters and there were certain matters that the defense counsel asked and there was a question as to whether it should be material, the Court should look it over and the Court would pass upon it and determine whether it [383] comes within the defense or not. All right, the court will recess subject to call.

(Whereupon, after recess the following proceedings occurred before the jury:)

The Clerk: Marking Defendant's 97, your Honor.

Q. (By Mr. Moore): Mr. Simonson, with reference to the Bank of Stevenson checking and savings accounts, it has been your testimony here that the savings account did not appear on Plaintiff's Exhibit 66 for the Years '52 and '53, isn't that correct? A. That is correct.

Q. Now, for those prior years what does that exhibit show insofar as any bank account in the Bank of Stevenson?

A. It shows that there was a bank account in the Bank of Stevenson at the end of 1950 and 1951.

Q. In the amount of how much?

A. \$10,125.78.

Q. Was there a bank account there at the end of 1950?

(Testimony of Paul Simonson.)

A. There was. I believe that the exhibit will show.

Q. Does it show here?

A. Yes, it shows here.

Q. How much? A. \$10,125.78.

Q. And that is the net worth statement which I delivered to you and Mr. Blankenship in December, 1954? [384]

A. That is correct.

Q. And Mr. Blankenship had started his investigation in September of 1954?

A. I believe you are right; yes, sir.

Q. And you had started on December 14th, of 1954?

A. That is correct.

Q. And in the course of your dealings with Mr. Brown you were notified that Mr. Brown had newly come into the picture insofar as an accountant with reference to Mr. Palermo?

A. I think that Mr. Blankenship advised me that Mr. Brown was working on it.

Q. And further that you received that net worth statement in December from myself, having requested it?

A. I am sure that Mr. Blankenship requested a net worth statement.

Q. And the other information was submitted to you and Mr. Blankenship consisting of profit and loss statements; net worth, reported income and indicated income were all so far as you know prepared by Mr. Brown from available records and submitted in December of 1954?

A. That is correct.

(Testimony of Paul Simonson.)

Q. And all at the request of you and Mr. Blankenship?

A. At the request of Mr. Blankenship or myself.

Q. Now, with reference to this \$10,000.00 omission from the [385] net worth statement for the end of 1952, you will recall, will you not, that you received that and then subsequently on a number of occasions you and Mr. Blankenship asked me if that net worth statement was correct insofar as we knew?

A. That is correct.

Q. And you asked me on a number of occasions if there wasn't some item missing?

A. Yes, I did. Yes, I did, Mr. Moore.

Q. And after you had asked me about that on two or three occasions it is true, is it not, that I lost my temper and asked you if you would kindly quit playing cute, or words to that effect, and tell me what it was, was omitted so that we could get it in?

A. You did ask me what was omitted.

Q. And I told you that I wanted to know what it was so that I could get it in there?

A. Yes, you asked me what it was.

Q. And didn't I advise you and ask you if there was something I could get into the net worth statement?

A. Yes, you asked me and I told you it was the savings account.

Q. And you told me? A. Yes.

Q. And I told you what? [386]

A. You told me that you knew about the account

(Testimony of Paul Simonson.)

and that you were going to pay the tax on that account.

Q. That I knew about the account?

A. You told me that you thought you knew about it and that it had been overlooked, that you knew about that, I don't know if this was the account but you knew about that account and you intended to pay tax on it.

Q. In any event, I advised you that that account was omitted by accident? A. Yes, you did.

Q. And that was the result of a mistake on my part and Mr. Brown's part and misunderstanding by Mr. Brown and Mr. Palermo?

A. Yes, you did.

Q. In questioning and answering?

A. Yes, you.

Q. Now, then, in the course of your investigation did you also learn from Mr. Blankenship when you first started your investigation that there was a bank account of any kind at the Bank of Stevenson?

A. As far as the bank account, the checking account, I think we were aware of that.

Q. You knew in December when you received this net worth statement that there was a bank account at Stevenson of some kind? [387]

A. Yes, we did. It is indicated on here.

Q. And the first time you went down there was in March? A. I think it was March, 1955.

Q. Did Mr. Blankenship advise you that when he first talked to Mr. Palermo that he had dis-

(Testimony of Paul Simonson.)

cussed the existence of the deposits at the Bank of Stevenson?

A. Excuse me, sir, I didn't hear your question.

Q. Did Mr. Blankenship tell you when you got into the case that when he first talked with Mr. Palermo that he discussed with Mr. Palermo the deposit of funds which Mr. Palermo may have had down at the Bank of Stevenson?

A. I don't recall but I think as I recall he knew of a checking account that he had down at Stevenson.

Q. Did he advise you that Mr. Palermo had told him that he had some money down at the Bank of Stevenson and that he didn't know how much it was but if he wanted to find out he could go down and find out that?

A. I don't recall discussing that with Mr. Blankenship, no.

Q. Did Mr. Blankenship advise you that he had asked Mr. Palermo for a savings account book?

A. He did, yes.

Q. And did he advise you that Mr. Palermo told him that he had one but he did not know where it was?

A. No, Mr. Blankenship did not advise me of that.

Q. He did not? [388]

A. And I don't recall any conversation like that.

Q. Now, going into Exhibits 86, 87, 88 and 89, Exhibit 86 being your summary with reference to 1950, according to your summary described by 86

(Testimony of Paul Simonson.)

in 1950, Mr. Palermo received income from how many sources?

A. Fifty-three—I mean fifty-three checks—I mean 1, 2——

Q. No, he received income from how many sources in 1950?

A. Do you mean how many people paid him?

Q. Yes, that's right.

A. Oh, seven people.

Q. And insofar as your summary discloses, his books showed that he received money from six of those people?

A. That is correct.

Q. And the one that was omitted was his father-in-law, Mr. Zunke?

A. That is correct.

Q. Now, you made a tabulation which was placed in evidence the other day concerning the number of checks received by Mr. Palermo for income items and the number of checks that were placed in the book that he had?

A. No, I think mine shows the number of checks omitted from the books and then the number of income checks he received.

Q. And then the percentage?

A. Yes.

Q. That got in the books and didn't get in the books?

A. Yes, that is correct. [389]

Q. Have you made a percentage recap of the gross income and the percentage that got in the books?

A. No, I have not.

Q. On any one of the four years?

A. On none of the four years, no, I have not.

Q. Now, in 1950, Mr. Simonson, Mr. Palermo

(Testimony of Paul Simonson.)

showed in his books that he received \$900.00 from the S. D. S. Lumber Company?

A. That is correct.

Q. And how much did he actually receive in that year from the S. D. S. Lumber Company?

A. He actually received in that year from the evidence we could find \$148.58 and I show he overstated his income for that.

Q. Did he overstate his income in any other respect on receipts in 1950? A. Yes, he did.

Q. What other receipts?

A. If you will turn to Mt. Adams Loggers Association—I don't mean an over statement in total, there is an understatement in total, but he recorded in his book \$884.68 when the check I found was \$884.08, so that check was overstated on his records by sixty cents. Then, there was another one where he recorded \$448.81 and the amount of the check we found was \$416.44 for an overstatement on [390] that check of \$32.37.

Q. And those are the overstatements for that year?

A. On McCormick Lumber Company I think that is the—the total amount not recorded on the books, the net amount was \$3,214.40 not recorded on the books but I did find two checks for which I could—recorded on the books which I could tie in no place with any receipts. I showed them in McCormick. However, there were other checks from McCormick which I could not find on the account

(Testimony of Paul Simonson.)

and in the total there was \$3,214.40 understated on the books.

Q. In other words, in his books he showed \$2,-784.00 that you could not find any record of anywhere?

A. That is correct. And in making my computation I deducted that amount I showed unreported and the net unrecorded on the books is \$2,300.00.

Q. Now, in checking over the summaries of 1950 as compared with Mr. Palermo's 1950 income tax return and the information given to Mr. Bates for the preparation of the income tax, do I understand it that the total number of checks or amounts recorded in Mr. Palermo's book under the heading "gross earnings" is exactly the amount that was placed in gross earnings on his income tax return?

A. The amount recorded in Palermo's books is the same as on the return, I am sure that it is.

Q. And that is the same figure that was used by Mr. Bates? [391]

A. By Mr. Bates, yes.

Q. Now, going back to the deposits to the banks in 1950. you showed one check of January 12th from McCormick for \$868.50 which you listed as non-income?

A. Or unidentified.

Q. Or unidentified? A. Yes.

Q. Now, the purpose of that was what?

A. To exclude those items as part of the income we had identified because it wasn't properly identified I felt as income because we did not have Mc-

(Testimony of Paul Simonson.)

Cormick's record for that period of January, 1950, to indicate what the payment was for.

Q. Do you mean when you went to McCormick's to get copies of the invoices and cancelled checks, Mr. McCormick had no records or cancelled checks for that period?

A. The only record I think we had of McCormick was starting March, 1950.

Q. There doesn't seem to be much question but what the \$868.56 is income, does there?

A. I have no idea what it is.

Q. Now, with reference to 1951 and your summary as described by Exhibit 87, is it——

A. That is correct.

Q. Now, in that year how many sources of income did Mr. [392] Palermo have?

A. He had income from five individuals or firms.

Q. And how many of those five were reflected on his books?

A. He recorded income at least from four of those people.

The Court: What year is this, now, Mr. Simonson?

A. 1951.

Q. And the amount of money that wasn't reflected in his book from that one individual was how much? A. \$445.85.

Q. In other words, he did business in 1951 with five companies or individuals, his books showed

(Testimony of Paul Simonson.)

that he did business with four of them and the one that was omitted Mr. Nickols paid him \$445.85?

A. That is correct.

Q. Was there any overstatement in 1951 by Mr. Palermo?

A. May I check, Mr. Moore? I don't find any, no.

Q. There was an error, was there not in the report from Mt. Adams Loggers in that one check for \$789.74 from Mt. Adams Loggers was put in the book as being from McCormick?

A. Yes, the books actually didn't reflect any receipts from Mt. Adams Loggers in 1951, except I did find this check from Mt. Adams for \$789.74 marked "McCormick" and finding a check from Mt. Adams in the exact amount—

Q. For the same date?

A. —identified I reported one of the checks for Mt. Adams. [393]

Q. For the same date?

A. For the same date approximately, yes.

Q. In 1950, you can go back to Exhibit 86 for a moment, there was a similar error, was there not, Mt. Adams Loggers, the record shows that he put Kingley in the book for the three items that he got from Mt. Adams Loggers, in the book?

A. I connected them up with Mt. Adams because the amounts were so similar. While his records didn't reflect any receipts from Mt. Adams, I assumed that the Kingley checks were Mt. Adams checks, since it wasn't an association.

(Testimony of Paul Simonson.)

Q. With reference to No. 88—is it for 1952?

A. Yes, sir.

Q. Was there any overstatement in that year?

A. On McCormick Lumber Company I did find this: While a total income not recorded on the books was \$4,894.53, on July 10th, 1952, I found payment on McCormick records of \$1,293.26. About that time Mr. Palermo recorded on his books from McCormick \$2,350.00, which is a difference—an overstatement of \$1,062.74. The same is true with the check of May 10th, 1952, which indicates that the overstatement of income on that particular check was \$96.40. However, the omitted checks subtracting those overstatements from the omitted checks, the understatement on the records is \$4,894.53. [394]

Q. Now, concerning the percentages, Mr. Simonson, did you by any chance work out percentages annually for the full four years which would show the percentage of money received by Mr. Palermo which was deposited in his bank accounts?

A. No. The only percentages that I made out was in relation to the physical number of checks which he received, that is the only percentages I worked on.

Q. With reference to the Exhibit 13, back on the Bank of Stevenson for the moment, I don't believe that you quite have this correct this morning when you were testifying on direct examination. I think that you testified that this checking account had been closed out on January 9th of 1951?

A. That is the way it appears here.

(Testimony of Paul Simonson.)

Q. Well, I will point out to you on January 9th, 1951, there was a balance of \$10,125.78 and there were no more entries until February 13, 1952, when you have the same balance?

A. That is correct. I made a mistake in reading it off. The final balance I show on this sheet of \$10,125.78, that was actually carried forward on this sheet when it was transferred at the end and there was this balance of \$10,125.78.

Q. And then that was closed out August [395] 20th, 1952? A. That is correct.

Q. Now, to explain the discrepancy here on your figures that you have submitted to make a determination of the underreporting of net income you have established that in this case by making changes only in the gross amount of money received by Mr. Palermo? A. That is correct.

Q. You have not made any changes as far as the expenses? A. No, I have not.

Q. And the distinction between that and the figures submitted to you by us in December, 1954, as reflected on the indicated net income figures and the net worth statements, to some extent are different because we modified the expense items?

A. That is correct, I think, in 1951 and 1952 you change it considerably.

Q. As an example of that it is true, is it not, that in 1950 I think it was—could I have 33, 4, 5 and 6. I believe it was in 1950 that there was a bad debt taken, or was that a subsequent year?

(Testimony of Paul Simonson.)

A. I think perhaps 1952, but I couldn't be certain.

Q. Yes. In the preparation of the return in 1952, Mr. Bates reflected a bad debt of \$5,508?

A. Yes.

Q. Which in the recap submitted to you Mr. Brown took it out? [396]

A. May I have the recap? I don't recall whether he did or not.

Mr. Moore: I am sorry, I thought you had that up there.

Mr. Velikanje: 67.

Q. Yes, Plaintiff's Exhibit 67.

A. You are correct, yes.

Q. And that is an example of one of the reasons for this distinction in the net income that we have?

A. That is an example for the year 1952, yes.

Q. And there are other modifications in all of the years? A. There are, yes.

Q. And so as a practical matter, the matter that we have attempted to work out heretofore has been with reference to the actual tax liability of Mr. Palermo, that Mr. Brown has been submitting to you? A. That I think is correct.

Q. And it is somewhat different than what the indictment reads here? A. It is, yes.

Q. Or the method of proof by which you have shown an underreporting? A. Yes.

Q. And insofar as a final computation adjusting both income and expenses, that has not been accomplished as [397] yet by your office?

(Testimony of Paul Simonson.)

A. I think it has been accomplished by our office, yes.

Q. But no information has been conveyed to the taxpayer, is that right?

A. I don't recall. I think perhaps we did advise probably nearly correct figures on civil cases, I don't recall, we had some discussion.

Q. There were discussions but not final?

A. Not final.

Mr. Blantz: Your Honor, I would object to any further discussion about the civil case, it has nothing to do with the present case.

The Court: No, it is not directly involved here.

Q. You still have the summaries there?

A. I do, yes.

Q. On 1950 on the McCormick sheet I think you will find an error. This is the summary that you made up there? A. Yes, uh-huh.

Q. Under McCormick on June 7th you show a figure of \$2,220.00; that should be \$2,200.00, should it not? A. May I have Exhibit 71?

The Clerk: Yes. (Handing to witness.)

A. Yes, receipts recorded in the book are \$2,200.00 instead of \$2,220.00. I have checked that addition across and that apparently is a typographical error because the subtraction [398] is not recorded in the proper amount.

Q. Now, according to your recollection, when did you first see Mr. Palermo's books for the years in question here?

A. The first I ever saw of the books or part of

(Testimony of Paul Simonson.)

the books, I don't recall how many books there were there, was December 28, 1954.

Q. In the Goldendale courthouse? A. Yes.

Q. And at this meeting you had requested that those books be brought?

A. I don't recall whether or not we requested it but I probably did.

Q. But in any event you had them there?

A. Yes, you had them.

Q. And you were given an opportunity to look over them completely at that time?

A. We looked over them but I don't think we looked over them completely.

Q. And you saw them again when?

A. I don't recall the date but I think sometime in 1955 and I think it was sometime in 1955 at your office probably about June. I may have seen them prior to that, too.

Q. Now, do you recall whether or not there were ever any references in those books, other than the pages that were headed "gross earnings," showing receipts or accounts [399] receivable from saw mills?

A. He had other references in the book. Yes, he did, but I don't recall exactly the nature of those references. They were—they happened to be memorandum records for his own purposes.

Q. And when you requested photostats the only request that you gave us was for the pages for gross earnings?

(Testimony of Paul Simonson.)

A. The pages showing gross earnings which totaled to that shown on the tax returns.

Q. Well, as a matter of fact, Mr. Simonson, you and Mr. Blankenship and I got together with the books and you pointed out the pages you wanted and we put a marker on them?

A. I probably did.

Q. With reference to the tax returns themselves for 1950, 1951, 1952, and 1953, disregarding the accuracy of the figures that are put in there, that is compared with whether it was a true expense of \$180.00 or a true receipt of \$60,000.00 or \$100,000.00, the figures that are used, are there any errors in those returns?

A. I do know of one error, yes.

Q. What error is that?

A. I think it is in the Year of 1953 on the Schedule "C."

Q. What is the error?

A. Oh, in subtracting \$34,666.73 from gross receipts of [400] \$102,901.72, the return reflects a balance of \$69,234.99, and I think correctly that should read sixty-eight thousand instead of sixty-nine thousand.

Q. In other words that would be a mistake in the preparation of the return?

A. Yes, it would be.

Q. And is that the only mistake that you could find in any of those returns?

A. That is the only one that I recall, it would be unless I withdrew them and checked.

(Testimony of Paul Simonson.)

Q. Have you checked at all?

A. I am sure that we have checked but there is a possibility of other errors. I don't know of any, though.

Q. Well, would you look at the 1951 return, under depreciation schedule? A. Yes.

Q. Is there any error in that schedule insofar as a "cat" is concerned?

A. I—I don't know insofar as the "cat" is concerned if there is an error or not.

Q. This is a "cat" purchased for \$8,750?

A. Yes, that is correct.

Q. To be depreciated in five years?

A. Yes.

Q. How much is taken per year? [401]

A. In this year \$875.00 is taken but this schedule doesn't show what the prior year's depreciation was. \$875.00 may have been all that was left in 1951.

Q. Would you look at 1952 and see if the "cat" appears there? A. It does.

Q. And it is again \$875.00 for that year?

A. That is correct, and with this information I would assume that the depreciation in 1951 was not correct.

Q. Then, in 1952 in the computation of the tax itself—— A. Yes.

Q. ——there is an error there, too, is there not?

A. There is an error of about—yes, there is an error in the computation of tax, a very minor one.

Q. A minor one, but it is an error?

A. It is an error.

(Testimony of Paul Simonson.)

Q. These are all items that require adjusting?

A. Yes, they would.

Q. Have you compared those tax returns to the information of Mr. Bates which were identifications—or Exhibits 26 through 30, I think?

A. Yes, I have.

Q. Did you find any variation between the figures that Mr. Bates had and the figures that ended up on the tax returns?

A. As far as gross receipts, I found except in the year 1953 I guess, when there was a one cent error on the tax return [402] from the information that Mr. Bates had the gross receipts compared with what Mr. Bates' records showed, and while I think—I do recall that there were some variations but they were very minor in most cases on the expenses that showed on Mr. Bates' papers.

Mr. Moore: May I have 20 through 30, please?

Q. Incidentally, in the course of your investigation have you reached the point where you can recognize Mr. Palermo's handwriting?

A. I think I do, but I am no expert at handwriting.

Q. Handing you Plaintiff's Exhibit 28, first and second pages, does some of that appear to be Mr. Palermo's handwriting?

A. I don't know. I would myself think it is. I don't know.

Q. And, then, there is some other writing on there if it isn't his, is that correct?

A. That is correct.

(Testimony of Paul Simonson.)

Q. I want to point out the items of "Fines, 75.50" and "Tools" 200.00 which appear to be in Mr. Palermo's handwriting, don't they?

A. Yes.

Q. And would you look in the final return and advise how those items appear there?

A. It is described at "Tools, cables, etc., \$275.00" and the fifty cents doesn't appear here. [403]

Q. And on this work sheet next to the "Fines, \$75.50" some other writing other than Mr. Palermo's has appeared to the right of it; it appears to be "tools," is that correct?

A. Yes, that is correct.

Q. And so apparently the fines became tools in the preparation of the tax return?

A. It would appear that way, yes.

Q. Incidentally, did you make any records from Mr. Palermo's books of the expenses reflected in those books?

A. I don't recall. I do recall, not from his books but I do recall making record of his expenses from his checks. I don't recall anything—I probably did from 1947 but I don't recall any other years. I think we used checks in any other years.

Q. I see. You in the course of your investigation made trips to White Salmon and Bingen?

A. Yes, I did.

Q. And how many banks are there in Bingen?

A. I don't think that there are any banks in Bingen whatsoever.

Q. How many banks in White Salmon?

(Testimony of Paul Simonson.)

A. I believe there is only one so far as I know.

Q. And Bingen is a community of about 600 or 800 and White Salmon is a community of about twelve or fifteen hundred?

A. They are small communities. [404]

Q. Very small? A. Yes, very small.

Q. And very close together? A. Yes.

Q. And these mills with whom Mr. Palermo did business are located where?

A. They are mostly in the White Salmon and Bingen area.

Q. Very close?

A. Most of them I think are right there in Bingen.

Q. Do your summaries reflect the total amount of income received by Mr. Palermo for the individual years and the amount of that income which was deposited in the bank at White Salmon?

A. Yes.

Q. Do you have the summaries right there?

A. Yes, I have the summaries right here, yes.

Q. In 1950, how much was the gross income of Mr. Palermo?

A. The income we show here is \$82,964.64.

Q. And how much of that went into the bank?

A. We show that \$80,444.20 went into the bank.

Q. At White Salmon?

A. Yes, at White Salmon and the Bank of Stevenson.

Q. How much of that went to the Bank of Stevenson; that \$1,800.00 item or was it more than that?

(Testimony of Paul Simonson.)

A. No, it was quite a lot in 1950. The total deposits in the [405] Bank of Stevenson in 1950 of the income items was \$44,226.44.

Q. Well, then, in 1951, what was his gross income according to your summary?

A. \$120,129.70.

Q. And how much of that money was deposited in bank accounts? A. \$118,948.79.

Q. And was all of that at White Salmon or some at the Bank of Stevenson?

A. No, that was all at White Salmon.

Q. And in 1952, the same information?

A. The gross income in 1952 was \$127,410.77.

Q. And the deposited?

A. The deposited was \$125,724.32, and I think all of that except \$1,857.60 was deposited at White Salmon.

Q. Incidentally, where was that check from, that \$1,857.60?

A. The Highland Lumber Company.

Q. All right, in 1953, the gross and the amount deposited?

A. In 1953, the income was \$116,865.89 and \$111,886.16 was deposited.

Q. Now, these bank accounts, the one in White Salmon, in whose name was that bank account?

A. I think it was in the name of Joe and Bertha Palermo.

Q. And the bank account—the checking account at Stevenson, in whose name was that? [406]

A. I believe that was Joe and Bertha Palermo.

(Testimony of Paul Simonson.)

Q. And the savings account at Stevenson?

A. I think that was in Joe and Bertha Palermo, also.

Q. And this money that you reflected in the bank over the years that Mr. Bantz was examining you and the bank account building up, that was in Mr. Palermo's checking account at the White Salmon Branch of the National Bank of Commerce on the one hand and on the other at the Bank of Stevenson?

A. The money was in the checking accounts and savings account?

Q. In the ordinary checking accounts?

A. Yes, as far as I know.

Q. Now, in the course of your investigation did you check the net worth statements submitted by us to you with reference to the property set forth therein?

A. They were checked by Mr. Blankenship and [probably assisted him during the investigation.

Q. Have you created a net worth statement in reference to those facts? A. I have not.

Q. Mr. Blankenship has?

A. Yes, Mr. Blankenship has.

Q. And do those net worth statements correspond to the one which we submitted, with this \$10,-000.00 adjustment?

A. There are some variations but substantially I think they [407] correspond except for—

Q. As to the increase in the net worth?

A. Yes.

(Testimony of Paul Simonson.)

Q. In the course of your investigation, Mr. Simonson, was there ever any time when you made the request to me or to Mr. Brown or to Mr. Palermo for information which you did not receive?

A. Yes.

Q. What was that?

A. I requested an affidavit or requested a question and answer from or statement from Mr. Palermo.

Q. Pardon?

A. I requested an affidavit and question and answer statement from Mr. Palermo.

Q. When did you make that request?

A. I think I made that request September 28, 1954, and you said you would think about it at that time.

Q. You weren't demanding it at that time?

A. No, not at that time. I was asking if you would give a statement such as that.

Q. That was down at Goldendale?

A. Yes, at Goldendale and I requested that you think about it for a future time.

Q. And then you never did get it?

A. No, I did not. [408]

Q. Did you ever ask for it again?

A. I don't recall if I asked for it again, no, I don't

Mr. Moore: Could I have Exhibit 2, please?

The Witness: I have No. 2 here.

The Clerk: No, it is here.

Q. With reference to Exhibit 26 which is ap-

(Testimony of Paul Simonson.)

parently a page describing gross earnings and some expenses and some work sheets which were used by Mr. Bates in preparation of the return, did you ever check Exhibit against Exhibit 2?

A. I have checked those.

Q. Being the tax return for that year?

A. Yes.

Q. Did you interrogate Mr. Bates about it?

A. I did interrogate him about those, yes.

Q. I will point out to you on the first page, I think it is under gross earnings in what appears to be Mr. Palermo's handwriting a figure of \$40,231.64.

A. Yes.

Q. And on the back page in what I believe is Mr. Bates' handwriting it says gross receipts \$8,-670.37.

A. Yes.

Q. Did you ever ascertain where that figure came from?

A. I didn't talk to him about it. I don't recall it. That looks like the gross receipts for 1948 as I recall. I believe that the books would reflect gross receipts for [409] 1948, about that figure.

Q. About that figure?

A. Yes. It may a 1948 sheet, I don't remember.

Q. Rather than a 1949?

A. Yes.

Q. I see. With reference to the Exhibit 97 for Identification, would you state what that is in general?

A. This is an excerpt from my report of January 23, 1956. It is a portion of my report.

(Testimony of Paul Simonson.)

Q. It is a portion of your report to your superiors concerning your investigation of Mr. Palermo?

A. Correct.

Q. And this is all of that report which relates to the question of discovery of a savings account in the Bank of Stevenson, except for a couple of other paragraphs which don't go into how you did discover or whether there was any problem of discovery?

A. Well, that is all that I found in relation to that savings account in my report. I had some other items that related to the checking account just——

Q. It is not only on that all that you found but it is all that there is, is that right?

A. It is all that there is, as far as I know.

Q. Now, in this report that you submitted to your superiors make any reference to the request which I made to be [410] advised of what it was that was missing from the net worth statement?

A. I don't recall.

Mr. Bantz: Your Honor, I would object to any further questioning on that as being immaterial to the case here, what was in the report, as he states that he made a report concerning this particular item and there is nothing else. It isn't even in the direct examination what was in the report and not even here in the cross-examination.

The Court: It isn't material and shown to be inconsistent with his present testimony and it is only for impeachment. I will sustain the objection to anything other than impeachment.

(Testimony of Paul Simonson.)

Q. Your testimony today with reference to your discovery of the savings account has been put forth by you in the following manner, is this correct, that you did not know of the existence of a savings account at the Bank of Stevenson until March, 1955?

A. That is correct.

Q. Does that testimony include the fact that you did not know facts which would lead you to the discovery of that savings account prior thereto?

A. I don't understand what you mean by knowing facts which would lead me to that.

Q. Would you have found that Bank of Stevenson Savings account [411] if you had gone to the Stevenson Bank before March?

A. I would imagine that we would have.

Q. Would you have found that Bank of Stevenson savings account if you had gone to myself or Mr. Palermo or Mr. Brown, and let us make it myself because you finally did, and ask if there was a Bank of Stevenson savings account?

A. I don't know. I would assume that if I would have asked you you would have checked to see if there was a savings account in the Bank of Stevenson.

Q. Is it your testimony today that you had difficulty in ascertaining the existence of that savings account?

A. My testimony is——

Mr. Bantz: Your Honor, I am going to object to such an inquiry. It isn't part of the case I don't believe here now. He hasn't had any testimony to

(Testimony of Paul Simonson.)

that effect and he just stated the facts as they were developed.

The Court: I will sustain the objection. I think that the testimony is clear on that.

Mr. Moore: I think that is all.

The Court: Is that all the cross-examination?

Mr. Moore: Yes.

The Court: Do you have some redirect examination?

Mr. Bantz: Yes, I have some redirect but I think it would take more than five minutes and not more than fifteen. We could come back and start it at one-thirty. [412]

The Court: I will excuse the jury. The case will be suspended until one-thirty.

July 26, 1957, 1:30 P.M.

The Court: Proceed.

Redirect Examination

By Mr. Bantz:

Q. Mr. Simonson, referring to Plaintiff's Exhibit 88, which is a summary, I believe, of receipts—just a minute, now, may I have Exhibit 87?

A. 87, I have it.

Q. Do you have 87? A. Yes.

Q. Is that the summary for 1951? A. Yes.

Q. I believe you testified on cross-examination that one check had not been recorded in the books and records of Mr. Palermo. Now, will you look

(Testimony of Paul Simonson.)

under the list of recorded in book. You have that in front of you there, do you? A. Yes, I do.

Q. What is the amount under Stevenson Plywood that was received by Mr. Palermo for the year 1952? A. For 1951?

Q. Or 1951, pardon me.

A. From Stevenson Plywood the tabulation shows the total [413] amount received was \$3,987.62.

Q. And how much was recorded in the book?

A. \$332.22.

Q. And how much was not recorded in the book?

A. \$3,655.40.

Q. Now, referring to the Mt. Adams Loggers Association, what was the amount received by Mr. Palermo this year? A. \$5,771.73.

Q. And how much was recorded in the book?

A. \$789.74.

Mr. Moore: Your Honor, I believe this is merely a recap of what the plaintiff brought out on direct examination. I don't believe it is proper redirect examination.

Mr. Bantz: Your Honor, I don't believe I brought these exact figures clear across on it. I believe I used a general summary in 1951 and this morning the testimony was how many checks were not recorded and I was just showing that there was a partial amount for each year.

The Court: All right.

Mr. Bantz: I have only two more, your Honor.

The Court: All right.

Q. The Mt. Adams Loggers Association, how

(Testimony of Paul Simonson.)

much was received? A. \$5,771.73.

Q. And how much was recorded in the book?

A. \$789.74. [414]

Q. And how much was not recorded in the book?

A. \$4,981.99.

Q. Now, McCormick Lumber Company, how much was received for that year?

A. \$59,331.83.

Q. And how much was recorded in the book?

A. \$49,966.34.

Q. And how much was not recorded in the book?

A. \$9,365.49.

Q. Mr. C. O. Ackley, how much was received from him? A. \$50,592.67.

Q. And what was recorded in the book?

A. \$47,089.92.

Q. And what was not recorded in the book?

A. \$3,502.75.

Q. Will you refer to Plaintiff's Exhibit 66, which I believe you have there? A. Yes, sir.

Q. I believe you testified on cross-examination or on direct examination you received that in the month of December, 1954? A. Yes.

Q. At the time you received Plaintiff's Exhibit 66 did you have knowledge of the savings account in the Bank of Stevenson; yes, the Bank of the Town of Stevenson, Washington? [415]

A. No.

Q. Concerning Mr. Palermo?

A. No, I did not.

Q. And does the \$10,000.00 show, the savings

(Testimony of Paul Simonson.)

account of \$10,000.00, does it show on that exhibit?

A. No, it does not.

Q. Mr. Simonson, there was some discussion about expenses on Plaintiff's Exhibits 3, 4, 5 and 6 by Mr. Moore this morning, concerning expenses. Have you in any way brought out or been connected with expenses insofar as this case is concerned?

A. Not as far as the case is concerned here.

Q. What is the basis, then, of the indictment concerning the years of 1950 through 1953?

A. It is an understatement of gross receipts of Joe Palermo that is concerned here.

Q. I believe you testified on cross-examination that you had seen the gross receipts ledger, if that is the name, or sheets of Mr. Palermo for the years 1950 through 1953, that are in evidence, when you examined his books and records, is that correct?

A. That is a photostatic copy of his books, that portion.

Q. Did you see any other sheets showing a tabulation of the gross receipts of Mr. Palermo?

A. No. [416]

Q. You stated on cross-examination that there apparently was an error in Schedule "C" on the 1953 tax return. Does that error in any way have anything to do with the reflection on gross receipts listed on said income tax return?

A. No, it does not.

Q. Do any of the other errors that were discussed with you this morning by Mr. Moore have

(Testimony of Paul Simonson.)

anything to do with any of the gross receipts listed on the income tax returns for the years of 1950 through 1953, inclusive?

A. Not with the gross receipts, no, sir.

Q. Does an error as to the depreciation schedule of an income tax return have any reflection as to the gross receipts on that return?

A. Not with the gross receipts, no.

Q. Are we concerned in our allegations of the indictment with any of the depreciation schedules or Schedule "C's" of the income tax returns?

A. No, our figures reflect only the unrecorded gross receipts, and expenses claimed on the return are all allowed.

Q. Are all allowed? A. Yes.

Mr. Bantz: That is all I have.

Mr. Moore: No questions.

The Court: No recross-examination, Mr. Moore?

Mr. Moore: No, your Honor.

The Court: That is all, Mr. Simonson.

(Witness excused.)

Mr. Bantz: The plaintiff will rest, your Honor.

The Court: I will ask the jury to step out.

(Whereupon, the following proceedings occurred in the absence of the jury:)

MOTION FOR DIRECTED VERDICT OR JUDGMENT OF ACQUITTAL

Mr. Moore: If it please the Court, the defendant now moves that the Court direct a verdict or judgment of acquittal for the defendant as to all four counts of the indictment, based upon the following matters. In this case a plaintiff, of course, must prove the essential allegations of the indictment, being the willful attempt to evade taxes, and in order to do so they have, and we have not contested it, the proof of delinquency in reporting income and thereby a delinquency in taxes.

However, as the courts have ruled, in order to prove a case such as this, the plaintiff must prove by independent proof, other than the mere under-reporting or understatement of income——

The Court: And that can only be done by circumstances unless the defendant has confessed, and the circumstances here are that large amounts were involved and that in quite a number of instances receipts were not deposited in the bank or deposited in the bank and not recorded, and that would be [418] sufficient to take the case to the jury.

Mr. Moore: I would like to cite the case of Elwert vs. United States, 231 Federal 2nd, 928.

The Court: What Circuit Court is that?

Mr. Moore: Ninth Circuit, 231 Federal 2nd 928.

The Court: All right.

Mr. Moore: I would like to quote from that where the rule here as in other cases is: The trial judge must grant a motion for acquittal where

evidence of guilt is circumstantial only if as a matter of law reasonable minds as triers of the fact must be in agreement that reasonable hypothesis other than guilt can be drawn from the evidence.

(Whereupon, discussion of case law was had and the following ruling of the Court was had during discussion.)

The Court: If that is to be taken literally I don't see how the Goernment could ever make a prima facie case of tax fraud in prosecution unless they had a confession, unless by what the defendant did and what could be an effort to conceal his income and keep it from getting on the tax return.

Mr. Moore: Well, I think that the basis for that, I think, your Honor, is this: I feel that taking the plaintiff's case at its best the most that can be said is under-reporting for the years in question.

The Court: Coupled with consistent failure to put on his books large amounts which he has received from logging [419] companies. In some instances the whole amount that he has received from certain buyers is not put on his books at all. That is exactly what the man does if he wants not to show his income. He can show his books and the statement is correct. It seems to me that this statement without any confession is sufficient to take the case to the jury. It is for the jury to determine the force and effect of it and what inference to draw in the light of the explanations.

Mr. Moore: I realize that, your Honor.

The Court: I will read this case at the earliest opportunity and I would like to see that.

Mr. Moore: It does set forth that rule and I submit it on that basis.

(Whereupon, after further discussion of the law, the following proceedings occurred.)

The Court: Are you ready to proceed with your defense?

Mr. Moore: Yes.

The Court: All right, bring in the jury.

Mr. Bantz: I will assume, your Honor, that the motion was denied.

The Court: Yes, the motion is denied. I thought that might be inferred.

Mr. Bantz: Yes, it was.

The Court: Well, then, the record should show that.

(Whereupon, the following proceedings occurred in the presence of the jury.) [420]

The Court: All right, proceed.

Mr. Moore: Call Mr. Keith McCoy. Come forward, please.

KEITH McCOY

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Would you state your name, please.

A. Keith McCoy.

(Testimony of Keith McCoy.)

Q. And where do you reside, Mr. McCoy?

A. In White Salmon, Washington.

Q. How long have you lived at White Salmon?

A. Most of forty years.

Q. And what is your occupation?

A. Insurance agent.

Q. How long have you been in that business?

A. Eleven and one-half years with my own agency, a total of fifteen and a half years, part of the total being as an employee of another agency.

Q. And are you acquainted with Joe Palermo?

A. Yes.

Q. How long have you know Mr. Palermo?

A. I believe fifteen years.

Q. Does he have business dealings with you?

A. Yes, sir. [421]

Q. And what are those?

A. Well, our business dealings have consisted primarily of policies which he has sought in connection with his lumber operation, fire insurance on various properties and life insurance.

Q. Has that been a substantial amount of business between the two of you?

A. It has been a very desirable account. It hasn't been a particularly substantial account in our agency in relation to that of some of the other lumber operators in the area.

Q. Now, does your acquaintance with Mr. Palermo extend to other than the insurance business that you have had with him? A. No, sir.

Q. During the period of time that you have

(Testimony of Keith McCoy.)

lived there have you become acquainted with the reputation of Mr. Palermo in the White Salmon-Bingen area for truth? A. Yes, sir.

Q. Do you know what that reputation is?

A. The reputation as far as I know has been nothing unfavorable, he and his family.

The Court: Well, that is good.

Mr. Moore: Yes, good.

Q. Do you know what his reputation has been for honesty? [422]

A. I have never heard anything adverse.

Mr. Bantz: Your Honor, I would like to have to answer yes or no and then he can answer good or bad because that is the proper way.

The Court: Yes.

Q. (By Mr. Moore): Answer yes or no whether you know his reputation for honesty?

A. Yes.

Q. And what is his reputation for honesty?

A. Favorable.

Q. Now, in your business dealings with Mr. Palermo, have you had occasion to discuss with him specific details of insurance policies or similar matters? A. Yes, sir.

Q. And along that line what has been your observation with reference to your explanation of details relating to insurance and insurance coverage and Mr. Palermo's evidence of understanding of those details?

Mr. Bantz: I would object, your Honor, to the answer to the question as being immaterial to the

(Testimony of Keith McCoy.)

case at issue; what he understands about insurance policies is not at issue here.

The Court: Well, I will overrule the objection.

A. I would say in answer to that, his grasp of the details of insurance by the nature of the contracts we have dealt [423] in has been not average or only average as evidenced by the fact that, oh, on more than one occasion that I can recall we have had some degree of misunderstanding as to the desirability of certain policies and have had to go over the case two or more times before we had a proper meeting of minds.

Q. You say go over the case——

The Court: I don't know whether you are trying to show that he is hard to sell or lacking in understanding.

Mr. Moore: I was going to go further into that.

Q. You said you had to go over something two or three times; you mean you had to go over it with Mr. Palermo two or three times?

A. Well, I can cite one instance.

Mr. Bantz: Your Honor, I would object to specific instances.

The Court: Yes, I don't think specific instances are proper, and the answer is not responsive.

(Question read.)

A. Yes, I did.

Q. Now, are you acquainted with the reputation of Mr. Palermo in the White Salmon area insofar

(Testimony of Keith McCoy.)

as his living or spending of money is concerned on his personal living?

Mr. Bantz: I object to that, your Honor.

The Court: I will sustain the objection to that. The [424] reputation testimony is limited to the traits involved in the charge.

Q. Are you acquainted with Mr. Palermo's home itself, the actual home in which he lives?

A. Yes, sir.

Q. And what type of home is it; is it a large expensive home? A. It was quite modest.

Mr. Moore: That is all.

Cross-Examination

By Mr. Bantz:

Q. Mr. McCoy, what kind of car does Mr. Palermo drive?

A. I believe he is driving a Buick at the present time.

Q. Has he driven a Cadillac in the last three or four years?

A. At one time, I don't recall how recently.

Q. Well, it has been in your memory anyway, hasn't it? A. Yes, sir.

Q. Did you insure the car?

A. No, sir, I have never handled the casualty line for him.

Q. Well, you state, don't you, that Mr. Palermo is of average intelligence insofar as the settlement of insurance business with you is concerned, is that right? A. No, that isn't.

(Testimony of Keith McCoy.)

Q. Isn't that what you said?

A. No, sir, I believe I said that his understanding of the contracts we discussed was average or below average. [425]

Q. What constitutes understanding of an insurance contract to you?

A. An understanding of the specific coverage which is being provided and the degree to which it may solve a particular problem within his personal or business life or in the line of coverage of property.

Q. Now, you had apparently some dispute with him as to some claims or something, is that correct?

A. No, sir, no dispute.

Q. Your dispute then was as to whether he was insured for a certain type of matter or whether he was not insured for it, is that right?

A. No, sir, there was no dispute whatsoever.

Q. Well, I thought you said you had some problem telling him what he was insured for, is that what you are talking about?

A. Well, if I may clarify that? You said I couldn't mention specific instances.

Q. No, I don't want you to. But have you had some problems as to his insurance coverage?

A. At renewal points on at least two types of coverage we have had to back up and go into coverage detail and repetition of the original understanding before he was willing to recognize that that which he was buying was right for his situation and before he choose to pay the [426] premium.

(Testimony of Keith McCoy.)

Q. All right, Mr. McCoy, the truth of the matter is that that happens every day that you are in the insurance business, is that correct; I mean that same instance happens every day when every guy comes in to you at renewal time, is that the fact?

A. No, sir, that is not the case.

Q. You don't have occasion on a change of policy or renewal to tell them what it is and go over the coverage and that type of thing when they come to renew a policy of insurance?

A. In a very small number of cases in our clientele.

Q. Now, you are talking about the reputation of Mr. Palermo being good in your area. Mr. McCoy, is his reputation a subject of conversation around your area? A. Yes, sir.

Q. Do you mean they talk about his reputation down there, do they?

A. Yes, sir. In a town the size of ours it is bound to be a point of conversation, when there is a situation such as this.

Q. Do they talk about your reputation, do you know?

A. I presume that they do occasionally. Very few people are immune in a town the size and type of ours.

Q. Now, you stated, I believe, that his honesty was favorable in your area. When you make that statement, is that a [427] discussion that you have had with some individual about his honesty or is

(Testimony of Keith McCoy.)

that what you consider every one thinks down there?

A. That is my personal opinion.

Q. In other words, your personal opinion is that he is honest?

A. Over all the dealings that I have ever had with him he was and also from the standpoint of a majority of expressions of opinion that I have heard, for what that may be worth.

Q. What you gave, though, was your personal opinion and not as reputation?

A. Well, reputation as I amended this last statement is not only one's personal opinion but is a composite of what one hears plus or minus for the person who is under discussion.

Q. Did you know that during the years—when you made up your mind about his honesty, did you know that during the years 1950, 1951, 2 and 3, that he had under-stated his gross receipts for his income on his income tax returns for those specific years?

A. No, sir.

Q. You had some dealings, Mr. McCoy, with Mr. Palermo on some financial statements concerning bonds, is that right?

A. That's right.

Q. He knows a dollar when he sees it, is that right? [428]

A. Yes, sir, that's right.

Q. And he had sufficient money to obtain bonds through your agency, is that right?

A. Yes, sir.

Q. And you had no problems with him during

(Testimony of Keith McCoy.)

this time making out financial statements or obtaining bonds?

A. Yes, sir, the only problem being that occasionally as we do with many of our clients we had difficulty in getting an exact pin-pointing figure for financial statement purposes, but that is not uncommon.

Q. But you know from your records that either you or Mr. Legler checked the bank and found that he had, oh, in excess of \$50,000.00 in cash at one time when you made a bond request, is that right?

A. That is right, yes, sir.

Q. That is a considerable amount of money insofar as that type of logging operation is concerned around there, isn't it, for an individual to have?

A. I presume it is. I don't think we can generalize on that from the standpoint of a type of logging operation accurately.

Mr. Bantz: That is all.

Redirect Examination

By Mr. Moore:

Q. Mr. Bantz has asked you about these bond matters. In the [429] issuance of a bond, a timber cutting bond—is that what you call them?

A. Yes, sir.

Q. What are those for?

A. There are various types of bonds, all of which are reasonably difficult to obtain. The most

(Testimony of Keith McCoy.)

commonly issued bond is the performance bond whereby the individual bonded agrees to comply with the state or Federal logging operations relative to slash disposal burning and reseedling and so on and so forth. Another type relates almost specifically to re-seeding matters. It is a five year bond which is extremely difficult to obtain because bonding companies must ascertain as thoroughly as they can through their own company and their agent that the principal or the person bonded has every chance of being alive and solvent business-wise five years from the point at which the bond is issued. There is still another type just recently used and made effective on Federal timber sales, which is a cash guarantee bond, it is called a payment bond, there are various types.

Q. Now, when you receive contact from a logger seeking a timber bond what do you do?

Mr. Bantz: Your Honor, that is a matter I think for direct examination.

Mr. Moore: He brought it out on cross-examination, your [430] Honor.

The Court: Well, all right, if he brought it out on cross-examination, all right.

A. The first item is take a financial statement and you start the application from the standpoint of whether or not his financial statement will support the bond applied for. The second point is opinion of the agent and verification from the bonding company representing that the person is of

(Testimony of Keith McCoy.)

good personal and business reputation in the area and is logically a subject for a bond.

Q. On these bond matters that you have handled for Mr. Palermo you would submit a financial statement as well as your opinion?

A. Yes, sir.

Mr. Moore: I think that is all.

Mr. Bantz: You may be excused. Pardon me, your Honor.

The Court: All right, he may be excused.

WILLIAM ZUNKE

called as a witness on behalf of the defendant, having been previously sworn, was examined and testified as follows:

The Clerk: Now, Mr. Zunke, you have been sworn before and your name is William Zunke?

The Witness: Yes, sir.

Direct Examination

By Mr. Moore: [431]

Q. Mr. Zunke, I think when you testified before you testified that you had known Mr. Palermo for over thirty years, is that correct?

A. Since 1930.

Q. Since 1930? A. Yes.

Q. And in 1932 he married your daughter?

A. Yes, sir.

Q. And from then until '47 I believe you testi-

(Testimony of William Zunke.)

fied he worked for you with some periods when he was working elsewhere?

A. From November, 1934 until November, 1947.

Q. From '34 to '47? A. Yes.

Q. And during that period he was working for you for wages as a truck driver? A. Yes, sir.

Q. Now, in 1947 you sold to him two pieces of equipment to go into the logging business, is that correct? A. No, three.

Q. Three. Oh, a truck, trailer and jammer?

A. Yes, sir.

Q. And when you sold that to him did you receive any down payment? A. No, sir.

Q. And you had no agreement—written agreement for that sale? [432] A. No, sir.

Q. Did Mr. Palermo at that time own any stumpage to your knowledge?

A. I don't think so. I don't know.

Q. From '47 to '53, when was it that you lived at White Salmon?

A. I moved there in the summer of 1950. I was there for a period of—I wouldn't state the exact time that I left in the fall but I was there in fall of 1950 and in the fall I went back home to Carnation.

Q. And then you weren't back at White Salmon until when? A. Until 1954.

Q. Until 1954? A. Yes.

Q. And when was it you went to Carnation, was it in '50? A. In '49.

Q. '49. Was there some period of time when

(Testimony of William Zunke.)

you were living at Carnation and working at White Salmon?

A. My home was in Carnation until the 6th of January, 1956, my home was in Carnation but I operated at White Salmon. I lived in a rented place at White Salmon.

Q. I am sorry, I can't hear you.

A. I say, I lived in a rented place at White Salmon until the 5th of January, 1956. I sold my place at Carnation.

Q. Now, how long was it after you sold these pieces of [433] equipment to Mr. Palermo that you received payment for them?

A. I am quite sure he paid me up sometime in 1948.

Q. 1948. The exact amount you do not recall now? A. I do not.

Q. And subsequent to that time after 1948 you on one occasion borrowed some money from Mr. Palermo and repaid it? A. On two occasions.

Q. On two occasions? A. Yes, sir.

Q. And did you also have other business dealings with him? A. No, not until '54.

Q. All right, in 1954 did you purchase something?

A. I bought some timber from him in 1954, some stumpage.

Q. Now, in all the time that you have known Mr. Palermo since 1930 and had business dealings with him, have you ever had any occasion arise in

(Testimony of William Zunke.)

which there was trouble between you and Mr. Palermo involving his honesty or truthfulness?

A. We never did.

Q. During the time that you have been in White Salmon have you had occasion to discuss with others Mr. Palermo's reputation for truthfulness and honesty?

A. Oh, I have heard lots of people——

Q. Discuss him? [434]

A. ——say that he was honest and that he always paid all of his bills and everything, and he always got along with everybody.

Mr. Bantz: Your Honor, I object to that answer, as it is not proper evidence of reputation.

The Court: Well, there was no objection made at the time. It was improper and the answer is not responsive.

Mr. Moore: Well, your Honor, I am sorry, I didn't know.

The Court: Well, you know how to establish character evidence, Mr. Moore, no doubt about that.

Q. Do you have knowledge of Mr. Palermo's reputation for truthfulness and honesty in the Bingen-White Salmon area? A. Yes.

Q. Do you know what that is?

A. Yes, I do.

Q. Will you state what that reputation is?

A. I don't know how to answer that.

The Court: Well, you know whether it is good or bad, don't you.

A. Well, it is good.

(Testimony of William Zunke.)

The Court: Well, that is the answer.

Mr. Moore: That is the answer. Could I have a moment, your Honor?

The Court: Yes, all right. [435]

Mr. Moore: I think that is all.

Cross-Examination

By Mr. Bantz:

Q. Mr. Zunke, you testified that the reputation for truthfulness and honesty of Mr. Palermo in the White Salmon area was good. Is his reputation for truthfulness and honesty a subject of conversation around White Salmon?

A. Yes, I have heard that.

Q. You have heard it discussed? A. Yes.

Q. You hear his reputation discussed?

A. Yes, sir.

Q. Are you giving your own personal answer to truthfulness and honesty or are you giving what other people have told?

A. I am giving mine.

Q. All right. Now, Mr. Zunke, in considering your answer for saying his reputation is good for truthfulness and honesty, did you know that during the years of 1950, 1, 2, and 3, that he understated his gross receipts on his income tax return for those specific years? A. I did not.

Q. Now, I want to ask you, your relationship I take it with Mr. Palermo is good?

A. That's right.

(Testimony of William Zunke.)

Q. How many children do you have Mr. Zunke?

A. Well, I have one.

Q. One? A. Yes.

Q. A daughter? A. Yes, sir.

Q. And your daughter is married to Mr. Palermo? A. Yes, sir.

Q. And you get along all right with your daughter? A. Yes.

Q. You have some grandchildren?

A. Yes, sir.

Q. And Mr. Palermo is married to your daughter and has been for twenty-five years or so?

A. Yes, sir.

Q. And as a son-in-law you and Mr. Palermo get along real well, is that right? A. Yes, sir.

Mr. Bantz: I have no further questions.

Mr. Moore: That is all.

The Court: That will be all.

BERTHA PALERMO

called and sworn as a witness on behalf of the defendant, was examined and testified as follows: [437]

Direct Examination

By Mr. Moore:

Q. Will you state your name.

A. Bertha Palermo.

Q. And you are the wife of Joe Palermo?

A. Yes, I am.

Q. When and where were you and Mr. Palermo married?

(Testimony of Bertha Palermo.)

A. We were married in Okanogan, Okanogan County, in June 25, 1932.

Q. Where had you grown up?

A. I have grown up at Olympia, Washington.

Q. And I believe that is where you first became acquainted with Mr. Palermo? A. Yes, it is.

Q. Now, when you married Mr. Palermo what was he doing for a living?

A. Well, when I and Mr. Palermo was married he wasn't employed right at the time. He had been working in the sawmill previous to that, but right at that time he wasn't working.

Q. And where did he work after that?

A. Well, after we were married a few months we went over to Okanogan County and he went to work for my father, Mr. Zunke.

Q. And then he worked for him for awhile and then discontinued working and then came back to work for him, is that [438] correct?

A. Well, we went there after we had been married, as I said, for a few months and then in the next summer then he left and went back to Olympia.

Q. And what type of work did he do there?

A. He went back to the sawmill.

Q. And then how long did he work at that?

A. He worked in the sawmill until I believe April, 1934, April or May.

Q. And then it was in 1934 that he went back to work for Mr. Zunke? A. Yes.

Q. And worked for Mr. Zunke at various locations around the state until 1947?

(Testimony of Bertha Palermo.)

A. That's right.

Q. And that employment was what, doing what kind of work?

A. Well, he went to work for my father at first cutting logs out in the woods, falling and bucking.

Q. And, then, what?

A. And then after that he drove a logging truck for him.

Q. Now, how many children did you and Mr. Palermo have? A. Two.

Q. What are their names?

A. Our son's name is Fritz Palermo and our daughter's name is Margie. [439]

Q. How old is Fritz?

A. Well, he will be twenty-four the next month, the 5th.

Q. And where is he?

A. He is at White Salmon.

Q. Is he in the logging business?

A. No, not any more.

Q. What does he do?

A. He is working for the Fish and Wildlife Service.

Q. The United States Fish and Wildlife Service? A. Yes.

Q. And your daughter is how old?

A. Twenty-one.

Q. And where does she live?

A. Well, she is at home at the present time.

Q. Now, in 1947 when Mr. Palermo went into

(Testimony of Bertha Palermo.)

the logging business what had he been doing immediately before that? A. Driving truck.

Q. For Mr. Zunke? A. Yes.

Q. In the White Salmon area? A. Yes.

Q. And from that time on, from 1947 up until the present date, was Mr. Palermo in business for himself? A. That's right.

Q. Now, do you know—and you can answer this question yes [440] or no—do you know whether or not when Mr. Palermo started business whether he had the assistance of an accountant or bookkeeper in keeping his books; do you know whether he did or did not? A. No.

Q. You do not know?

A. No, I don't know.

Q. Do you know how far Mr. Palermo went to school? A. Yes.

Q. How far?

A. Well, he went through the first eleven years.

Q. Finished the three years of high school, the third year in high school? A. Yes.

Q. During the period of time from 1947 through 1953, did you have anything to do with the keeping of the records from the logging operations of Mr. Palermo? A. No, I did not.

Q. You did handle some of the money, however?

A. Yes, I did.

Q. Who kept the books on the income and expenses of the logging operations?

A. Mr. Palermo did.

(Testimony of Bertha Palermo.)

Q. And where did he keep them, where did he do this?

A. Well, he generally did it at home in his little room that [441] we had for him where he has his desk.

Q. He had a room with a desk in it for keeping papers? A. Yes.

Q. With reference to the income that was received during the period after he started in logging, did you on some occasions receive checks which were for payment for logging done by Mr. Palermo, did you personally receive those in the mail or otherwise?

A. Well, they came through the mail, yes.

Q. And what did you do with them as you got them?

A. Well, I generally—we have one place in the house where we put all the mail that comes for Mr. Palermo and I put it right on this little shelf unopened.

Q. Now, during the logging season when he first started logging in 1947 until the end of 1953 when logging season was going on, what time did Mr. Palermo generally get up in the morning to start his day's work?

A. Well, we would generally get up around five or five-thirty in the morning, and so if we got up at five he would leave around five-thirty to start his day's work.

Q. And what time did he get home at night?

(Testimony of Bertha Palermo.)

A. Well, sometimes it would be six, seven, eight or nine o'clock before he would get home.

Q. And how many days a week did he generally work?

A. Six days a week and once in awhile on Sundays. [442]

Q. Do you know when he made entries in his books during those periods?

A. Well, generally it would be in the evenings after he came home from working all day.

Q. Now, concerning the handling of checks that were received for logging, was there any particular method of operation that was followed by Mr. Palermo or by you and Mr. Palermo for the deposit of checks in the bank account?

A. Oh, generally when the checks came in through the mail or the checks were received as I stated before they would be placed on this one shelf, and then Mr. Palermo would pick them up and take them to his desk.

Q. And did you make deposits on occasions?

A. Yes, I did.

Q. Was there a definite day of the week or something like that, that you were supposed to take the checks up and deposit them in the bank account?

A. No, there wasn't.

Q. What would be the practice for your taking the checks up and depositing them?

A. Well, when Mr. Palermo would leave so early in the morning and go to work he wouldn't have time to come in and put them in the bank and he

(Testimony of Bertha Palermo.)

would be in late at the bank and he would always ask me to make deposits for him that he couldn't make. [443].

Q. And so you handled the making of the deposits of checks on a number of occasions?

A. Yes, I did.

Q. Now, did you also cash checks for Mr. Palermo? A. Whenever he instructed me to do so.

Q. Now, when I spoke of cashing checks, I mean did you receive checks which were made payable to Mr. Palermo for logging from someone else to take them to the bank and get cash; in other words, cash them at the bank or some place else?

A. I would if he would tell me to do so.

Q. Did you also make purchasing trips for Mr. Palermo during this period? A. Yes, I did.

Q. And where did you make those trips?

A. Well, some days I would have to go to Vancouver, Washington, or I would have to go to Portland, Oregon, to different parts houses.

Q. And on occasion did you take cash for those trips? A. Yes, I did.

Q. And what was the reason for taking cash instead of writing checks from whomever you would take parts from the parts houses?

A. Well, some of these parts houses wouldn't accept a check.

Q. And you took the checks at Mr. Palermo's direction to [444] go and obtain certain specific items? A. Yes.

Q. And you took the cash by cashing the checks at Mr. Palermo's specific direction?

(Testimony of Bertha Palermo.)

A. Yes, I did.

Q. Now, you presently live in a home at White Salmon? A. Yes, we do.

Q. How long have you lived in that particular home?

A. We have been living in that home seven years.

Q. Purchased in 1951?

A. Somewhere along there.

Q. How large a home is it?

A. Well, it is not an overly large home, it is just a comfortable home.

Q. What construction is it; frame?

A. Frame.

Q. Do you know how much the purchase price of the home was? If you don't know just say so.

A. Oh, I just don't remember.

Q. And you and your daughter and husband live there together? A. Yes, we do.

Q. How many rooms are in the home?

A. About six rooms.

Q. During the period of 1947 up to the end of 1956 was there any change in the amount of time spent in logging by [445] Mr. Palermo?

A. No, there wasn't. He still worked those long hours.

Q. During the year 1954 you and Mr. Palermo acquired an interest in a hotel, did you not?

A. Yes, we did.

Q. And that was located where?

A. In Hood River, Oregon.

Q. And that hotel was disposed of when?

A. May 1st of this year.

(Testimony of Bertha Palermo.)

Q. And it had been on the market how long?

A. Well, it had been on the market for almost two years.

Q. And who operated that hotel?

A. I did.

Q. Now, during the period of time from 1947 to the end of 1953, did you and Mr. Palermo take any vacations together?

A. No, we didn't, not to speak of.

Q. Did you make any trips anywhere?

A. Oh, we maybe made an overnight trip up to Olympia to see his folks but we would be just overnight or for two or three days at the most.

Q. Somewhere during that period of time Mr. Palermo did go to a convention of some sort or to two conventions? A. Yes.

Q. How many did he go to from the fall of 1947 until 1953?

A. Well, he would go to one a year. [446]

Q. Here in the state? A. Yes.

Q. But other than that he took no vacations at all? A. No, he didn't.

Q. Mr. Palermo is he a member of any fraternal organizations? A. Yes, he is.

Q. What does he belong to?

A. He belongs to the Eagles and the Elks.

Q. How long has he belonged to the Eagles?

A. Well, I would say ever since about 1943 or 1944.

Q. And does he hold any office in the Eagles?

A. Yes, he held several offices in the Eagles.

(Testimony of Bertha Palermo.)

Q. What is he now?

A. He is the Past President.

Q. And any other office now, other than being Past President?

A. Well, he has been trustee for the last three years.

Q. He has been trustee?

A. Yes, and Chairman of the Board of Trustees up until this last year, up until the last three months.

Q. Has his membership in the Eagles involved the spending of any time by him with that organization?

A. Yes, it has.

Q. Doing what?

A. Well, being Chairman of the Board of Trustees, they would have their trustee meetings on every Wednesday Night and [447] he would always have to be there to preside over the meetings, and then he had other things to do as far as seeing that the clubroom was run properly and everything was going smoothly. That was left up to him an awful lot.

Q. Do you know Mr. Palermo's parents?

A. Yes, I do.

Q. And where do they live?

A. They live in Olympia, Washington.

Q. Do you know the parents of Mr. Palermo have received income for their living expense in the last few years?

A. Well——

Mr. Bantz: I would object, your Honor, as being immaterial in this case.

(Testimony of Bertha Palermo.)

The Court: I think it is immaterial.

Mr. Moore: During the period of 1947—part of 1947 to the end of 1953.

The Court: I will sustain the objection. There is no contest as to the expenditures I understand. It is merely a matter of income.

Mr. Moore: I think that is all for the moment. Do you want to take a recess now?

The Court: All right, the court will take a ten minute recess.

(Whereupon, after the afternoon recess, the following proceedings occurred:) [448]

The Court: All right, proceed.

Mr. Bantz: I may examine?

Mr. Moore: Yes.

Cross-Examination

By Mr. Bantz:

Q. Mrs. Palermo, I assume that you stated that when you got mail that it was placed in a certain spot in your house and was left unopened for your husband, is that correct? A. That's right.

Q. And then your husband came home and then he got the mail and opened it himself?

A. Yes.

Q. He had a little room where he kept his books and records, is that right? A. Yes, he did.

Q. He took his mail in and opened up his mail and took care of it in that particular room, did he, is that correct? A. Yes.

(Testimony of Bertha Palermo.)

Q. Now, Mrs. Palermo, I take it then that your husband handled the checks before he gave them to you to cash? A. Yes, he did.

Q. He knew then, in other words that if he received a check from John Jones, he saw that before he told you to go and cash it? I am using "John Jones as a fictitious name.

A. Yes, he did. [449]

Q. You had nothing to do with the bookkeeping of the concern that your husband was in business for himself with, I take it? A. No, I didn't.

Q. Your husband kept his own books and records? A. Yes.

Q. He received all of the checks himself by your leaving them in a certain place in the house, is that right? A. Yes.

Q. Now, when you cashed checks did he tell you which ones to cash? A. Yes, he did.

Q. And he gave you the checks? A. Yes.

Q. And you cashed them? A. Yes. Yes.

Q. When he sent you to Portland did he give you the cash to go down and pay the distributor down there for parts for the trucks or whatever you were buying?

A. He generally gave me the checks and told me to get them cashed.

Q. All right. But he knew when you were going down to Portland to get parts and things like that?

A. Yes.

(Testimony of Bertha Palermo.)

Q. And he knew how much money you had? [450] A. Yes, he did.

Q. And he knew what you were going to spend it for? A. Yes.

Q. I presume you brought all the receipts home and put them up in the place you kept the bills?

A. Yes.

Q. And he kept track of all of the bills?

A. Yes.

Q. And now you state that he worked after hours and kept his books and records up. How many nights a week did he work on his books and records?

A. Well, it would average three or four nights a week.

Q. All right, that means three or four nights after he came home that he would balance up his books and see that they were in order, is that correct? A. Yes.

Q. He spent one night a week running the Eagles Lodge, is that right? A. Yes.

Q. Did he have any other business that he had to take care of at night other than the Eagles Lodge and Elks and taking care of his books and records?

A. No.

Q. I am assuming that you went out and went to a show once in a while and things like that, but I am assuming that [451] he had nothing special to do when he did that, is that right?

A. That's right.

(Testimony of Bertha Palermo.)

Q. Well, during the winter time did Mr. Palermo work at the logging right up to January?

A. Yes, generally they will work until January or the first part of the year.

Q. And then there is two or three months that they don't have anything to do? A. Yes.

Q. Did he work on his own equipment at that time? A. Yes.

Q. Did he work on his books and records during that time? A. Yes.

Q. Was it during that time that he wasn't busy that you went up to Mr. Bates and signed your income tax returns?

A. Well, not always because the returns weren't always ready at that time.

Q. Well, did you go up to Mr. Bates' office and sign the income tax returns that had been prepared by him for your husband?

A. Yes, with my husband I did.

Q. You would go with your husband?

A. Yes.

Q. And you would sign them together up there? [452] A. Yes.

Q. And did you then mail them down there?

A. Yes, or Mr. Bates sometimes mailed them, I am not sure on that.

Q. Yes, all right, but one of you mailed them into the Collector of Internal Revenue, is that correct? A. Yes.

Q. And you did that mailing at White Salmon or Bingen, Washington? A. Yes.

(Testimony of Bertha Palermo.)

Q. Now, you stated that you bought a hotel?

A. Yes.

Q. When was it that you bought that hotel?

A. In the fall of 1954.

Q. How much money did you pay for it?

A. I don't rightfully know.

Q. Did Mr. Palermo handle all the business transactions of that hotel?

A. Most of it, yes.

Q. You didn't handle the business transactions?

A. No.

Q. When you sold the hotel who handled the transactions?

A. Mr. Palermo handled them.

Q. And he wrote the checks in the payment of the hotel and handled that part of it? [453]

A. Yes.

Q. And did he handle the monthly business part of the hotel also?

A. Well, whenever he had time to be with me he did, otherwise I would have to take care of it.

Q. All right, you actually ran the hotel, didn't you? A. Yes.

Q. How big a hotel was that?

A. It was an eighty-three room hotel.

Q. Eighty-three rooms? A. Yes.

Q. If he was around he would take care of the business end of it at the end of each month at the hotel?

A. Yes, if he could make it he would.

Q. Otherwise you would do it? A. Yes.

(Testimony of Bertha Palermo.)

Q. Did you have a separate account out of which you handled that hotel out of? A. Yes.

Q. And he was familiar with the operation of it, such as income and expenses, as far as they were concerned, is that correct? A. Yes.

Q. You had nothing to do with the purchasing as far as the purchase price was concerned? [454]

A. No.

Q. He made all that arrangement?

A. Yes.

Q. He made all the arrangement for selling?

A. Yes.

Q. Now, you made the statement that you did not assist him in the bookkeeping of his logging operation; that is correct, is it?

A. That is correct.

Q. He was in charge of it solely himself?

A. Yes.

Q. How often did you make the deposits to the bank, Mrs. Palermo, do you have any idea?

A. No, I don't. I would make them whenever he would tell me to make them. Whenever he couldn't get to the bank I would make them.

Q. But he got to the bank quite often himself, didn't he?

A. Well, not too often really because he was working every day.

Q. And if he didn't get to the bank very often and you didn't get to the bank very often, who put the money in the bank?

A. Well, he—he would—as I said before, he

(Testimony of Bertha Palermo.)

would make out the deposits and I would take them to the bank.

Q. All right, he made out the deposits; is that right? [455] A. We both did.

Q. But he gave you the checks to write down on the deposit slips from whom he had got them, is that it? A. Yes.

Q. And sometimes you made out the deposit slips and you would take them to the bank?

A. Yes.

Q. But many times he wrote up the deposit slips himself, is that right?

A. Yes, many times he did.

Q. But you wouldn't handle any of the business concerning his logging operation without his permission, is that right? A. That's right.

Q. What kind of car do you drive now, Mrs. Palermo? A. A Buick.

Q. And what kind of car did you drive in 1950?

A. In 1950 we drove a '49 Chevrolet—no, I will take it all back—we drove an Oldsmobile.

Q. And what did you have in 1951?

A. Oldsmobile.

Q. And 1952? A. Oldsmobile.

Q. And what did you have in 1953?

A. Well, that year we did have a Cadillac. [456]

Q. You state that Mr. Palermo is a member of the Elks Club? A. Yes.

Q. Is he an active member in the operation of the club? A. No, he is not.

(Testimony of Bertha Palermo.)

Q. I take it, he is active in the Eagles?

A. Yes.

Q. Now, he has been the Past President of the Eagles? A. Yes, he still is.

Q. Oh, he is still the Past President?

A. Yes, he still is the Past President.

The Court: Yes, he still would be the Past President. You don't get over that.

Q. Is he trustee of the Eagles at the present time? A. Yes.

Q. Was he Chairman of the Board?

A. He has been.

Q. He has been? A. Yes.

Q. When he was Chairman of the Board did he have charge of the business operation of the Eagles Club? A. Yes.

Q. And he handled the finances of the Eagles Club, did he? A. Yes.

Q. How long did he have that job?

A. Oh, I would say around three years. [457]

Q. And when was that, do you remember?

A. Well, I can't remember just the year he started as Chairman of the Board but I would say around 1954.

Q. Was he President of the club during the years 1950 to 1953? A. No, he wasn't.

Q. Was he active in 1950 to 1953? A. Yes.

Q. As Past President? A. Yes.

Q. He is still Past President? A. Yes.

Q. Did you ever just go to the bank and take the checks there for the purpose of cashing them

(Testimony of Bertha Palermo.)

and keeping the cash in your pocket, I mean with your husband's instructions? A. No.

Q. When you cashed the checks you used them for some purpose? A. Yes, that's right.

Q. Like the purchasing trips to Portland or Vancouver? A. Yes.

Q. You didn't go just to cash checks and buy groceries and things like that with them?

A. No.

Q. I assume you live an average normal life at White Salmon as far as your expenses are concerned, is that right? [458] A. Yes, we do.

Mr. Bantz: I have nothing further.

Mr. Moore: I have nothing further.

The Court: I think that is all.

(Witness Excused.)

The Court: Now, Ladies and Gentlemen, this is early to quit today but the attorneys feel that they can use the time profitably in making preparation for closing the case next week, and have convinced me that it would save time in the long run if they would quit and come back and start Monday morning, and so I am going to excuse you now until Monday morning at ten o'clock. The court will adjourn.

Monday, July 29, 1957, 10:00 A.M.

The Court: Proceed.

Mr. Moore: Call Mr. Babb. Come forward, Mr. Babb.

The Clerk: Mr. Babb, are you Marion Babb?

The Witness: I am.

The Clerk: And you have already been sworn in this case?

The Witness: Yes, sir.

MARION BABB

called as a witness by defendant, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Your name is Marion Babb? A. Yes.

Q. And you are the Manager of the White Salmon Branch of the National Bank of Commerce?

A. That's right.

Q. And you testified here last week?

A. That's right.

Q. Mr. Babb, to review, how long have you known Joe Palermo?

A. I'd say that I have known him or known of him since late '51 or early 1952.

Q. And in your capacity as Manager of the bank you have known him personally, is that correct?

A. Yes.

Q. And the basis of your acquaintanceship

(Testimony of Marion Babb.)

with him has been strictly in relation to the bank business?

A. I would say primarily, yes.

Q. At the present time is there any business dealings between the bank and Mr. Palermo.

A. There is.

Q. And what is that?

A. Both in the way of deposit account and a loan.

Q. I am sorry, you will have to speak up.

A. Both in the way of a deposit account and a loan.

Q. There is an outstanding loan from the bank to Mr. Palermo? [460] A. Yes.

Q. When was that loan made?

A. It was in the latter part of '56 or the first of this year. I think the latter part of '56.

Q. And that was in relation to what; loan for his logging business? A. Yes.

Q. Now, Mr. Babb, you stated I believe last week how long you had lived at White Salmon. Will you repeat that?

A. Since September, 1951. I went to White Salmon in September, 1951.

Q. Are you acquainted with the reputation of Joe Palermo in the White Salmon-Bingen area for truthfulness? A. Yes.

Q. What is that reputation for truthfulness?

A. He has always been considered truthful in my opinion.

Q. I can't hear you, Mr. Babb?

(Testimony of Marion Babb.)

A. He has a reputation for truthfulness.

Q. Are you acquainted with his reputation in the White Salmon-Bingen area for honesty?

A. Yes.

Q. And what is that reputation?

A. He has a reputation for honesty.

Q. And are you acquainted with his reputation in the White Salmon-Bingen area as a law-abiding member of the community? [461]

A. Yes.

Mr. Bantz: I don't believe that that is material in the case.

The Court: The objection overruled.

Q. You are acquainted with that? A. Yes.

Q. And what is that reputation?

A. He has a reputation of being a law-abiding citizen.

Mr. Moore: I believe that is all.

Cross-Examination

By Mr. Bantz:

Q. Mr. Babb, have you discussed with other people or with people in that area about his reputation?

A. It has been discussed, yes.

Q. In other words, his reputation has been a subject of conversation down in the White Salmon area, is that right?

A. I would say that is generally true of anyone in a small community, yes.

Q. And how about his; has his been a subject of conversation?

A. Yes, his has been discussed.

(Testimony of Marion Babb.)

Q. Did you know that during the years '50, 1, 2 and '53 that he had understated his gross receipts on his income tax returns for those years?

A. I had no knowledge of it until subsequent years that there had been some question of it, yes. That is after '53. [462]

Q. Yes. The reputation you are talking about is for the years including '50 to '53, or from '53 on?

A. From the time I have known him.

Q. Which is about 1952?

A. Yes, early 1952.

Mr. Bantz: No further examination.

Redirect Examination

By Mr. Moore:

Q. Your reference to his reputation is as of 1952 or during the period from 1952 until the present date.

A. From 1952 to the present time.

Q. With reference to the question Mr. Bantz ask you concerning when you became aware of the fact that there had been an understatement of income by Mr. Palermo in his income tax returns for 1950 through 1953, when did you become aware of that fact?

A. Well, I had naturally knowledge that there was investigation being done by the Department of Internal revenue—well, I don't recall the year but it was in 1954 that I first knew of it.

Q. In 1954?

A. Yes. I believe it was 1954. I believe it was after 1953.

Mr. Moore: That is all.

Mr. Bantz: I have nothing further.

The Court: That is all. [463]

JOE CROWE

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Your name is Joe Crowe?

A. Joe Crowe.

Q. And where do you live, Mr. Crowe?

A. White Salmon, Washington.

Q. How long have you lived there?

A. I moved there in '39.

Q. '39, and have lived there continuously?

A. Yes, sir.

Q. What is your occupation?

A. County Commissioner of Klickitat County.

Q. County Commissioner of Klickitat County?

A. Yes, sir.

Q. And how long have you known Joe Palermo?

A. Since 1936.

Q. Where did you know him before you were at White Salmon?

A. Cle Elum, Washington.

Q. Was that acquaintanceship with Mr. Palermo, has that been business or social, or both?

A. Both.

Q. And in what respects has it been business? [464]

(Testimony of Joe Crowe.)

A. We have had business dealings with lodges—directors of lodges there at White Salmon and at Cle Elum. We logged together some and our acquaintanceship was in logging and skidding.

Q. You were formerly a logger?

A. Yes, sir.

Q. Do you have any business dealings with Mr. Palermo at the present time? A. None.

Q. Are you aware of Mr. Palermo's reputation in the White Salmon-Bingen area for truthfulness?

A. Yes.

Q. Would you state what that is?

A. Very truthful.

Q. Are you aware of Mr. Palermo's reputation in the White Salmon-Bingen area for honesty?

A. I am.

Q. And what is that? A. Very good.

Q. I can't hear you. A. Very good.

Q. And are you aware of Mr. Palermo's reputation in the White Salmon-Bingen area as a law-abiding member of the community?

A. I am. [465]

Q. And what is that reputation?

A. He is a law-abiding member of the community.

Q. With reference to Mr. Palermo's reputation for truthfulness, honesty, and as a law-abiding member of the community, how long has he had that reputation to your knowledge in the White Salmon—

A. Since my acquaintance with Palermo.

(Testimony of Joe Crowe.)

Q. Pardon me, let me finish my question—in the White Salmon-Bingen area?

A. He has always had that reputation.

Mr. Moore: That is all.

Cross-Examination

By Mr. Bantz:

Q. Mr. Crowe, his reputation has been good since the time that you have known him in that area you stated. Did you know during the years '51, '52—'50, 1, 2 and '53 that he had understated his receipts for his income tax returns during those years? A. During those years?

Q. Yes. A. No, I did not.

Q. When did you learn of that?

A. Well, the first evidence I had of it was when I learned of this trial here.

Q. Have you talked with people in that area about his [466] reputation?

A. I wouldn't say that I talked about his reputation, no. You always hear discussion of it all the time like in any small community.

Q. Well, his reputation is a subject of conversation in the White Salmon area?

A. No, not that I can say. There is no question of his reputation being good.

Q. Are you giving me your personal opinion of the reputation of Mr. Palermo?

A. I would say that I am giving the opinion of the community as I found it from associating with him and his associates.

Mr. Bantz: I have no further questions.

Mr. Moore: That is all.

The Court: That will be all, Mr. Crowe.

Mr. Moore: Mr. Sprague.

The Clerk: Mr. Sprague, you are Theodore Sprague?

The Witness: Yes, sir.

The Clerk: And you were sworn?

The Witness: Yes.

THEODORE SPRAGUE

called as a witness by the defendant, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Your name is Theodore Sprague?

A. Yes.

Q. And you are generally known as "Jolly" Sprague, is that right? A. Yes, right.

Q. Mr. Sprague, you testified the other day that you live in the White Salmon area?

A. Yes, right.

Q. How long have you lived there?

A. Since 1945.

Q. And have you been in the logging business there since that time?

A. Logging and sawmill business.

Q. And you are acquainted with Mr. Palermo?

A. Yes.

Q. Has that acquaintanceship been anything

(Testimony of Theodore Sprague.)

other than a business acquaintanceship to which you testified last week?

A. Well, when you are doing business with a man you always have some social acquaintanceship with him. Am I answering your question?

Q. Your acquaintanceship with Mr. Palermo includes social? A. Yes.

Q. Are you presently doing business with Mr. Palermo? A. Yes, I am. [468]

Q. And does that involve his selling logs to you at your sawmill? A. Right.

Q. Are you aware of Mr. Palermo's reputation in the White Salmon-Bingen area for truthfulness?

A. I am.

Q. Would you state what that is?

A. It is very good as far as I am concerned.

Q. Are you aware of his reputation in the White Salmon-Bingen area for honesty? A. I am.

Q. And what is that? A. It is very good.

Q. Are you aware of his reputation in the White Salmon-Bingen area for being a law-abiding member of the community? A. I am.

Q. And what is that? A. It is very good.

Q. With reference to the question that I have asked you as to his present reputation, has his reputation for honesty and truthfulness and being a law-abiding member of the community changed in any way since you have become acquainted with him? A. No.

Mr. Bantz: Your answer? [469]

A. No.

(Testimony of Theodore Sprague.)

Mr. Moore: I believe that is all.

Cross-Examination

By Mr. Bantz:

Q. Mr. Sprague, did you know that during the years, 1950, 1, 2, and '53 that Mr. Palermo understated his gross receipts in his income tax returns for the specific years?

A. I did not know that at that time.

Q. Have you talked with people in the White Salmon area about his reputation?

A. Of what time?

Q. Recently. Is his reputation a subject of conversation in that area?

A. I would say recently, yes.

Q. Are you giving your personal opinion——

A. Definitely.

Q. ——as far as you are concerned?

A. Definitely.

Mr. Bantz: I have nothing further.

The Court: That is all then.

EDWARD PARKER REED

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Would you state your name, please.

A. My full name is Edward Parker Reed. Edward P. Reed.

(Testimony of Edward Parker Reed.)

Q. Where do you live? A. White Salmon.

Q. How long have you lived at White Salmon?

A. Since late 1950.

Q. When?

A. I would say the fall of 1950.

Q. What is your profession?

A. I am an Attorney at Law.

Q. Do I understand that you have been practicing at White Salmon since the fall of 1950?

A. Yes, that is right.

Q. You are a duly licensed and practicing Attorney in the State of Washington?

A. I am. I paid my last annual fees.

Q. Are you acquainted with Joe Palermo?

A. Yes, I am.

Q. In what capacity has that acquaintanceship been?

A. I would say primarily in a business way. I have handled a good deal of his business such as it is from early 1951, and to some extent it has been social.

Q. And what has that professional relationship involved?

A. Primarily isolated real estate transactions and timber [471] purchases and a few sales. I would say general run of the mill work for a general practitioner.

Q. When you say real estate do you mean purchase of stumpage?

A. Yes, there have been timber deeds and timber contracts.

(Testimony of Edward Parker Reed.)

Q. Are you presently working on anything for Mr. Palermo?

A. Yes. I have at least two matters in the office now that I can think of.

Q. With reference to Mr. Palermo's business dealings with you and your social acquaintanceship with him, have you become aware of his reputation in the White Salmon-Bingen area for truthfulness?

A. I have.

Q. And what is that reputation?

A. I'd say the best.

Q. With reference to Mr. Palermo's—your acquaintanceship with Mr. Palermo and residing in that area, are you acquainted with his reputation for honesty?

A. Yes, I would say I was.

Q. And what is that?

A. I would say the best.

Q. With reference to his reputation in the White Salmon-Bingen area for being law-abiding member of the community, are you acquainted with that reputation? A. Yes.

Q. And what is it? [472]

A. I would say the best.

Q. Has that reputation been changed during the period of time that you have been acquainted with him? A. No, it has not.

Mr. Bantz: Is that all?

Mr. Moore: Yes, I believe that is all.

(Testimony of Edward Parker Reed.)

Cross-Examination

By Mr. Bantz:

Q. Are you the only Attorney in the White Salmon area?

A. No, I am not, Mr. Bantz, there is another.

Q. And who is he?

A. Grant P. Soley is his name. I am the senior of the two.

Q. You have been there how long, Mr. Reed?

A. I would say late in 1950. I graduated in June, 1950 and as soon as I got my admission notice from the Bar I went there.

Q. You have been there ever since?

A. Yes, I have.

Q. How recently have you discussed with people about Mr. Palermo's reputation in the area?

A. I would say quite recently. I would say it has always been continuous since it became a matter of public knowledge that there has been discussion about his affairs.

Q. Have you been talking with people about his reputation since the trial started in Yakima? [473]

A. Since the trial started?

Q. Yes.

A. No, I don't think so, Mr. Bantz. I was away. I was in Salt Lake City and I was at the beach, and I haven't.

Q. Mr. Palermo has been coming to you to handle his transactions in the real estate business and hotel business?

(Testimony of Edward Parker Reed.)

A. Yes, he has. To my knowledge anyway I have handled it all.

Q. And he has been just a regular client of yours that comes back in when he needs some legal work done, is that correct? A. That is true.

Q. You haven't been a business advisor to him, have you, at all?

A. Well, I don't think you can practice law without giving him business views in a legal sense but in the technical sense I haven't.

Q. You have just been doing his legal work, basically, I mean? A. Basically?

Q. He doesn't come to you and ask you if and how he can spend his own money? A. No.

Q. He handles his own affairs that way?

A. Well, let me put it this way since you have asked the question, Mr. Bantz. He has asked my opinion as to one or two deals and I have cautioned him against them and he [474] has gone ahead and done it and made more work for us.

Q. He has a mind of his own, is that right?

A. Oh, yes, he does.

Q. Mr. Reed, you apparently know the gentleman's reputation. Did you know during the years 1950, '51, '52 and '53 that Mr. Palermo had understated his gross receipts on his income tax returns for those specific years?

A. I have known that ever since when it became more or less a matter of common knowledge when the investigators were calling in town. I think Mr. Blankenship and others called and I think at that

(Testimony of Edward Parker Reed.)

time I knew that they were questioning Mr. Palermo, and up to that time I didn't know.

Q. You did not know what the charge was or anything? A. No, I did not know.

Q. I take it, though, as a Lawyer you have talked about his reputation with people in the community, in the area? A. I have.

Q. I take it his reputation is a subject of conversation in the area?

A. It is just as it is one of the things that the others said they found in a small community.

Q. What is that a good or evil thing, would you say?

A. It is very evil but you can adjust to it and in time you take it all right. It takes a while but you adjust to it, [475] you know that, as you well know, Mr. Bantz.

Mr. Bantz: I well know, I grew up in a small town. That is all.

Redirect Examination

By Mr. Moore:

Q. Did you have anything to do with Mr. Palermo's buying the hotel? A. Yes, I did.

Q. What did that involve?

A. It involved taking on a hotel and a large mortgage that was there and paying some cash and not very much and also transfer of three rental properties in White Salmon.

Q. Did your relationship with Mr. Palermo on

(Testimony of Edward Parker Reed.)

that transaction involve anything other than the closing of the deal after he had made it?

A. I went to Hood River as his agent and he had signed some kind of earnest money receipt and to get the cat out of the bag the deal wasn't set up right and I released that earnest money receipt and incidentally it was the Palmas the people that he bought it from and I had to draw some papers and we had to clear up the deal from then on.

Q. What I was trying to find out, had he discussed the purchase with you before making any committment? A. Yes, he did.

Q. And before he signed the earnest money?

A. Yes, he did and I indicated that I had considerable misgivings about it.

Mr. Moore: That is all.

Recross-Examination

By Mr. Bantz:

Q. Just one other question, Mr. Reed. You don't treat Mr. Palermo any different than any of the rest of the clients we deal with as lawyers or any other of the people we deal with?

A. I don't believe I do.

Q. It is strictly a lawyer-client relationship, I take it?

A. It is a small town lawyer-client relationship.

Mr. Bantz: That is all.

Mr. Moore: That is all.

(Witness Excused.)

Mr. Moore: Mr. Brown.

The Court: Is this another character witness?

Mr. Moore: No.

The Court: All right.

ALLEN BROWN

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you state your name, please. [477]

A. Allen Brown.

Q. And where do you live, Mr. Brown?

A. Vancouver, Washington.

Q. And how long have you lived there?

A. Since 1937.

Q. And what is your profession?

A. I am a Certified Public Accountant.

Q. Licensed by the State of Washington?

A. Yes.

Q. How long have you been such?

A. Since 1948.

Q. And you practice there at Vancouver, Washington? A. Yes.

Q. And are a partner in the firm of Mickelwait and Brown, is that right. A. That's right.

Mr. Bantz: I would stipulate that Mr. Brown is a well-qualified C.P.A. and there is no question about his being an expert if they want to qualify him as such.

Mr. Moore: Thank you, Mr. Bantz.

(Testimony of Allen Brown.)

Q. When did you become acquainted with Mr. Palermo, Mr. Brown?

A. About the middle of October, 1954.

Q. And that was where?

A. At Vancouver, Washington. [478]

Q. Mr. Palermo came to your office?

A. Yes.

Q. And what was the purpose of his visit?

A. He had a list of items which had been written by Mr. Blankenship that Mr. Blankenship wanted provided in connection with the investigation which he had started as regards Mr. Palermo's tax returns. As I recall, that list included a net worth trace from 1949 to 1953 and by specific years if possible, he wanted a reconstruction of the profit and loss for those years if it could be done and other similar items. He also requested that if Mr. Palermo is to be represented by someone enrolled to practice before the Treasury Department that a power of attorney be submitted.

Q. And thereafter did you commence the preparation of those forms? A. Yes, I did.

Mr. Moore: May I have Exhibits 67 and 68 and 69?

Q. Handing you Exhibit 66, is that the net worth statement which you prepared?

A. Yes, this is the original net worth trace that we prepared.

Q. And you prepared that between sometime in the Month of October of 1954 and sometime in the Month of December, 1954?

(Testimony of Allen Brown.)

A. That is correct. [479]

Q. Now, when you prepared that net worth trace what did you use for the preparation?

A. Primarily questions directed to Mr. Palermo as regards what he had in the beginning and end of each of the years involved, and insofar as I could learn or in the period of time available information that we could dig out to support the cost of the various assets which he stated and any records of liabilities which existed at the end of each of those years, and insofar as possible the amount of money he had spent for personal living and other personal reasons.

Q. And on the basis of the preparation of that net worth trace is there any major change that would be necessary by reason of such work which you have done in relation to Mr. Palermo's business?

A. Yes, there would. During 1952 the bank account—the checking account at the Bank of Stevenson at Stevenson, Washington, was closed. We had shown on the net worth trace that there was on December 31, 1950, and December 31, 1951, a checking account at the Bank of Stevenson and during August of 1952, that account was closed and in reviewing with Mr. Palermo as I had been over several days over long periods of time and many hours a day, and in developing this net worth trace I asked questions similar to: Was that account transferred? And he [480] answered me in the affirmative that it had been transferred. On the White Salmon bank statements about the same time of the month or shortly

(Testimony of Allen Brown.)

thereafter were two deposits, large deposits in the neighborhood of \$4,000 and \$10,000.00, and I made an erroneous assumption that the bank account had been transferred to White Salmon. As a matter of fact, in recapping deposits in that year and totaling the deposits I eliminated the total of the money deposited from the monies of that year the Bank transfer of \$10,000.00 in order to arrive at the indicated gross receipts by a bank deposit method. So, at that time and subsequent to that time I was under the impression and erred in not questioning him further perhaps that the money there in the Bank of Stevenson had been transferred to the bank at White Salmon.

Q. Then, after discovering this error the net worth statement would have to be changed to include the savings account at the Bank of Stevenson?

A. Yes, it would.

Q. Are there any other major changes that would have to be made which had been brought to your attention by some other further work that you may have done?

A. Not that I recall.

Q. Now, with reference to Exhibit 67—oh, one more question before we leave Exhibit 66. Before you delivered Exhibit [481] 66 to me for delivery to Mr. Blankenship, did you go over that net worth trace with Mr. Palermo?

A. Yes.

Q. Now, Exhibit 67, when did you do the work that is shown on Exhibit 67, which is differences between reported and indicated net income of Mr. Palermo for the years 1951 through 1953?

(Testimony of Allen Brown.)

A. Sometime during the period of the middle of October to the middle of December, 1954.

Q. Now, are there any major changes that would have to be made in Exhibit 67 by reason of subsequent developments?

A. Yes, in the matter of gross receipts or total receipts on this particular schedule there would have to be changes in each of the years in the indicated gross receipts. For the year 1952 the gross receipts would have to be adjusted by virtue of my having reduced the receipts by this \$10,000.00 transfer over which I became confused. Also in each of those years there were some small checks which had not been deposited at the bank. At that time we were using a bank deposit method to determine gross receipts. Subsequently, Mr. Blankenship and Mr. Simonson brought to our attention some small checks, a list of small checks which we had not included in the method which we approached this during the first few weeks we were working [482] on it.

Q. And is that the only major change that would have to be made with reference to Exhibit 67, those two items?

A. As far as gross receipts are concerned, yes.

Q. And would I be correct in assuming that the recapitulation by Mr. Simonson of checks received by Mr. Palermo, checks in the book and checks deposited and checks not deposited, would reflect the items which were not discovered and which would have to be included in those years?

(Testimony of Allen Brown.)

A. That's right.

Q. Now, with reference to Exhibit 68, which is a Statement of Profit and Loss for three years, is it not, 1951, 1952 and 1953?

A. Yes, that is correct.

Q. Was that also prepared by you between October and December, 1954? A. Yes.

Q. And, again, were those preparations made from bank statements? A. Yes, they were.

Q. And would there be any major changes so far as Exhibit 68 is concerned in order to correctly reflect the statement of profit and loss during those years?

A. Yes, the same adjustments would be necessary as regards gross receipts as we just discussed in Exhibit 67. [483]

Q. Adjust for the \$10,000.00 and for the undeposited checks? A. That's right.

Q. Now, concerning Exhibit 69, what is that?

A. It is all the deposits—a list of deposits in the National Bank of Commerce of White Salmon for 1951, 1952 and 1953 as prepared by me in the course of this recap of receipts.

Q. That shows receipts deposited in the White Salmon Branch of the National Bank of Commerce?

A. That's right.

Q. And what did you use to make that up?

A. I used the bank statements themselves insofar as they were available, in Mr. Palermo's possession.

(Testimony of Allen Brown.)

Q. Oh, the ones—the statements that would go back to him with cancelled checks?

A. Yes, I think that is right. Oh, I think subsequently—I better correct that. I don't know whether it was subsequent to the preparation of these or during the preparation of these that we did go to the National Bank of Commerce at White Salmon to pick up the ledger sheets that may have been missing from his files at home.

Q. And so with reference to Exhibit 69 do you know whether there would have to be any major changes in Exhibit 69?

A. The only change would be to list—the deposits listed for the year 1952, you would have to adjust the bank [484] transfer of \$10,125.78 to arrive at the indicated receipts of income for the year.

Mr. Moore: Your Honor, would it be permissible to take a recess at this time so that I could get some exhibits?

The Court: Yes, we will recess. The court will recess at this time subject to call.

(Whereupon, after recess the following proceedings occurred:)

Mr. Moore: Would you mark those, please.

The Clerk: I will mark Defendant's 98, 99, 100, and 101.

The Court: All right. Those are all in evidence, aren't they.

The Clerk: No, I say I am marking them.

The Court: Oh, yes, I see.

(Testimony of Allen Brown.)

Q. (By Mr. Moore): Handing you Plaintiff's Exhibits 16, 17, 18, 19, and 19-A, in the course of your working on Mr. Palermo's tax deficiency computation have you seen duplicates of those items?

A. I have seen duplicates of some of these items.

Q. And where did you obtain those?

A. From Mr. Palermo's files.

Q. And in going over the duplicates were you able to ascertain from those duplicates the names of the mills to whom Mr. Palermo had sold logs during the years [485] 1950 through 1953?

A. Yes. Generally speaking, there were some—some deposits slips merely had a bank number.

Q. Now, with reference to Exhibits 86, 87, 88 and 89, which are the summaries prepared by Mr. Simonson for the years 1950 through 1953, you have examined those, have you not?

A. Yes, I have.

Q. And with reference to the checks that are referred to therein, and whether they were recorded or not recorded in Mr. Palermo's book about which Mr. Simonson testified were deposited or not deposited in the bank, are those summaries generally correct so far as you are concerned?

A. Yes, they are.

Q. Handing you Defendant's Exhibits 98, 99, and 100 for Identification, do you know what those are?

A. Yes, these are the record books as kept by Mr. Palermo in connection with his logging operation at White Salmon.

(Testimony of Allen Brown.)

Q. Which he delivered to you? A. Yes.

Mr. Bantz: Which number is that?

Mr. Moore: I will bring that out now.

Q. 98 is for what year? A. 1950.

Q. And what is contained in that book in general?

A. There is—in general it contains gross earnings, [486] stumpage payments or obligations for stumpage earnings records of the employees of Mr. Palermo and a few notations as to payments paid, payments made to others, there are very few of those notations.

Q. What year is Exhibit 99 for Identification?

A. For the year 1951.

Q. And does that contain approximately what 98 did?

A. Yes. Substantially the same information as contained in the book for 1950.

Q. And with reference to Defendant's 100 for Identification, would you state what that is, what year?

A. This book contains similar information to that of the other two for the years 1949, 1952 and 1953.

The Court: Is that 100?

Mr. Moore: This is one hundred even.

Q. Do you know whether those books were ever presented to Mr. Simonson and Mr. Blankenship for their viewing?

A. To the best of my knowledge, they were.

(Testimony of Allen Brown.)

Q. Handing you Defendant's Exhibit for Identification 101, would you state in general what that is?

A. This is a recap of statistice in connection with gross income of Mr. Palermo for 1950, 1951, 1952, and 1953, which I prepared to compare the corrected gross income as I determined them as was determined by Mr. Simonson.

Q. And that was prepared at my request? [487]

A. That's right.

Q. And in preparing that identification did you use the information that is presently in evidence?

A. Yes, I did.

Q. One question while we are waiting: With reference to Exhibits for Identification 98, 99 and 100, have those books been changed any since they were delivered to you by Mr. Palermo?

A. Only insofar as I have made some little tick or check marks as I was making up the various summaries and recaps.

Q. Any little check marks are yours, is that it?

A. Yes.

Mr. Moore: We offer 101, your Honor.

Mr. Bantz: I have no objection to 101. You did not offer 98?

Mr. Moore: No.

The Court: 101 will be admitted.

(Whereupon, said document "Gross Income Statistics" was admitted in evidence as Defendant's Exhibit No. 101.)

(Testimony of Allen Brown.)

Q. Handing you Defendant's Exhibit 101, will you state specifically what is shown on this exhibit?

A. The corrected—for the year 1950 corrected gross income [488] as determined by me and as determined in the indictment or by Mr. Simonson, the gross income reported as contained on the tax returns which are admitted here, the gross income deposited as determined by me and as shown on Mr. Simonson's summaries, and the same information—oh, excuse me.

Q. Now, would you read the information for the year 1950?

A. As I determined the income, the corrected gross income for 1950, \$89,221.35, per the indictment \$82,964.64, using those as 100 per cent of gross income; the gross income reported as determined by me or as indicated on the tax returns, \$66,090.94, and the same figure in Mr. Simonson's summary. The percentage that the reported income is of the corrected gross income, my determination is 74.1 and Mr. Simonson's determination is 79.7 per cent. In other words, that is the amount of indicated gross income which was reported.

Q. In other words, on your computation Mr. Palermo reported for 1950, 74 per cent of his gross income?

A. That's right.

Q. And under Mr. Simonson's he reported 79.7 per cent?

A. That's right. Now, the gross income which was deposited, according to my determination was

(Testimony of Allen Brown.)

97.2 per cent and according to Mr. Simonson was 97.0 per cent.

Q. Now, that would include deposits in both the bank of [489] Stevenson and the bank at White Salmon, is that correct? A. That is right.

Q. Now, what is the reason of this discrepancy between your figure and Mr. Simonson's?

A. In Mr. Simonson's summaries in evidence here he has eliminated items which he could not identify as income to his satisfaction.

Q. With reference to the year 1950, would you indicate what that would be?

A. The total amount you wish?

Q. Yes.

A. \$6,256.71, they have eliminated as non-income or unidentified.

Q. Now, with reference to the year 1951, would you recite your computations as you did for 1950?

A. In 1951 the corrected gross income by my calculations is \$120,179.70. By Mr. Simonson's, \$120,129.76. The gross income reported by my calculation and by Mr. Simonson's, \$98,178.22, and in both cases the percentage reported of the corrected gross is 81.7 per cent. The gross income deposited by my calculations is \$118,998.79, and by Mr. Simonson, \$118,948.79, and 99.0 per cent of the corrected gross income was deposited in the bank or banks.

Q. And was there again a discrepancy in the gross income as computed by you and Mr. Simonson?

A. Yes, very small, \$50.00. My corrected gross

(Testimony of Allen Brown.)

income was [490] \$50.00 higher than Mr. Simonson's. I believe that was a matter of computation.

Q. With reference to the year 1952, would you state what that is?

A. The 1952 as determined by me is \$129,322.79, by Mr. Simonson \$127,410.77. Gross income reported was the same, \$97,952.27, which is 75.7 under my determination and 76.9 under Mr. Simonson's. The gross income deposited under my calculations is \$127,636.34, which is 98.7 per cent of the gross income deposited. Mr. Simonson's is \$125,724.32 of the gross income which was deposited or 98.7 per cent of the gross income which was deposited in the bank or banks.

Q. The 1953?

A. \$117,550.40 and Mr. Simonson's is \$116,865.89. The gross income reported is the same in both cases, \$102,901.72, which is 87.6 per cent of the gross income under my calculations, 88.1 per cent under Mr. Simonson's of the gross income deposited \$112,570.67 which is 95.8 of the gross income. Mr. Simonson's calculations, the amount deposited was \$111,865.89, which is also 95.8 per cent of the amount he calculated to be correct.

Q. With reference to Exhibits 93, 94, 95, and 96, which I believe are recapitulation and computation of the tax for the four years in question by Mr. Simonson, have you [491] examined those exhibits?

A. Yes, I have.

Q. And do they appear to be a correct computation of the tax based upon figures Mr. Simonson

(Testimony of Allen Brown.)

used? A. Yes, they do.

Q. Now, Mr. Brown, you became acquainted with Mr. Palermo in 1954, as you stated, and have you since that time had dealings with Mr. Palermo?

A. Yes.

Q. Involving what?

A. Primarily the—the computations and recaps and investigation in connection with that. However, I have prepared his individual tax returns or his joint tax returns for he and Mrs. Palermo for 1954, 1955 and 1956.

Q. In the course of this preparation of those tax returns you have become acquainted with his business operations in logging, as well as the hotel business? A. Yes.

Q. Do you know what he paid for this hotel?

A. Not specifically without reference to my files in that connection. It would be in the neighborhood of ninety-five to \$100,000.00, including the mortgages assumed and contracts.

Q. And are you acquainted with the operation of that hotel as it was operated from the accounting standpoint until it [492] was disposed of?

A. Yes.

Q. Was there any profit realized from the operation of the hotel? A. There was none.

Q. Do you know what the loss in the operation amounted to?

A. Generally in 1955 and 1956 the net operating loss in each of those years was \$17,000.00 and some dollars and cents, \$17,000.00 in each year.

(Testimony of Allen Brown.)

Q. Insofar as the computations which you made and delivered to Mr. Simonson and Mr. Blankenship, was that accomplished at Mr. Palermo's direction to you? A. Yes.

Q. After you first became acquainted with Mr. Palermo did you go to White Salmon?

A. Yes.

Q. Did you have other clients in that area?

A. In the general area, yes.

Q. And did you at that time in 1954 investigate Mr. Palermo's reputation—— A. I did.

Q. ——in that area? A. I did, excuse me.

Q. Did you ascertain his reputation for honesty and truthfulness and being a law-abiding man as of that time? [493] A. I did.

Q. And what did you find out?

A. I found it to be good.

Mr. Moore: I think that is all.

Cross-Examination

By Mr. Bantz:

Q. I take it, while I have these in my hands, that the computations of tax that the Government figured out for the years 1950 through 1953 are correct so far as you are concerned? A. Yes.

Q. There apparently is no discrepancy between any of the figures except with minor variation that Mr. Simonson put in evidence through his summaries than what you have put in yours, except maybe a few checks we have talked about, is that correct?

(Testimony of Allen Brown.)

A. That is correct. I think that the major errors are items that he couldn't identify and we have included some of those.

Q. Yes. You have made out the income tax returns now, I take it, Mr. Brown, for the last three years, is that correct? A. That is correct.

Q. Mr. Palermo has assisted you in giving you the necessary material to make out those income tax returns? [494] A. Yes.

Q. Now, you reviewed the Plaintiff's Exhibits 1, 2, 3, 4, 5 and 6, which are the income tax returns of 1948 through 1953, I take it, is that correct?

A. That's right.

Q. Now, did you also review in connection with that the exhibits that Mr. Bates had that were termed work sheets for Mr. Bates which were Exhibits 71, 72, 73, and 74? Do you recall what I am talking about? A. Yes.

Q. And did the gross receipts as far as you are concerned compare exactly as to what was put on the income tax return?

A. The gross receipts indicated in these work sheets?

Q. Yes; the Bates work sheets.

A. Yes; to the best of my recollection, yes.

Q. And didn't Mr. Bates' work sheets agree with the Exhibits 26, 27, 28 and 30 which were the ledger sheets for gross receipts of Mr. Palermo, or books, whatever you call them? A. Yes.

Q. In other words, now, the books that Mr. Palermo kept and the records that he turned over to

(Testimony of Allen Brown.)

Mr. Bates and the income tax returns all coincide, don't they? A. As regards gross receipts.

Q. Yes; as regards gross receipts. [495]

A. Yes.

Q. And there was a gross understatement for each of the years involved from 1950 through 1953 that you have checked yourself, is that right?

A. Yes; there were.

Q. And those figures are correct that we have put in, insofar as you are concerned, being an accountant? A. Yes.

Q. Actually, there is somewhat of a difference on Defendant's Exhibit 101, and that comes from the fact that some of those items that Mr. Simonson couldn't put his finger on he left off and did not count as income, is that right?

A. That's right.

Q. As far as you were concerned was Mr. Simonson fair in making up his statement then?

A. Yes; I think so.

Q. Now, I notice in Defendant's Exhibit 101 that you have gross income reported for the year 1950 as 79 per cent, no, 74 per cent. Now, that means 74 per cent of your gross income as far as you were concerned, and that was because you added the additional items to it, is that right, Mr. Brown?

A. Yes; that's right.

Q. And he reported in 1951, as far as you were concerned, 81.7 per cent of his income? [496]

A. That is right.

(Testimony of Allen Brown.)

Q. And in 1952 he reported 75.7, is that correct?

A. Yes.

Q. I mean, I am reading from this exhibit?

A. Yes.

Q. And in 1953 he reported 87.6 per cent of his income? A. Yes.

Q. Now, did you add up the total amount of his income that he did not report during those four years?

A. I may have. I have a lot of work papers in those files. I think I did but I can't recall now.

Q. Now, we have had some discussion with reference to Plaintiff's Exhibit 66 in which it was brought out that there was a \$10,000.00 item that apparently you felt and feel was an error as far as you were concerned, is that correct?

A. That is right.

Q. I am taking it, Mr. Brown, you are assuming the responsibility of the \$10,000.00 the way you have testified? A. I certainly am.

Q. Did you feel that Mr. Palermo told you about this \$10,000.00?

A. I think I felt that he had when I asked him about it. I think I felt he had answered my question. I was negligent in not asking him further questions about it. [497]

Q. Now, did he tell you about all of his deposits and his checks and everything else that he had, did he freely tell you those things?

A. Absolutely. Yes; absolutely.

Q. And the \$10,000.00 then that was in the bank

(Testimony of Allen Brown.)

that he had transferred, you felt that he had told you about it and you paid no further attention to it?

A. That's right. I made an assumption as to what he said.

Q. You were assuming, weren't you, that he was telling the truth about it, then?

A. I never had any other reason to feel otherwise.

Q. Now, did he tell you about the—during the years 1950 through 1953 that we are talking about, did he tell you about any of his undeposited checks when you were talking to him?

A. Not that I recall.

Q. In other words, your questioning to him, I take it, was enough that he should have told you about the undeposited checks, though?

A. Possibly. I don't recall the exact manner of my questioning him about these receipts.

Q. You have reviewed Plaintiff's Exhibits 99, 100—rather, Defendant's Exhibits for Identification 98, 99, and 100 in connection with this trial?

A. Yes. [498]

Q. Those books and records have not been admitted yet, but do those books and records coincide with all the testimony we have had here?

A. As regards gross receipts?

Q. Yes; gross receipts.

A. Gross receipts on the pages labelled gross earnings.

Q. I believe you stated, didn't you, that the summaries by Mr. Simonson are correct as far as you are concerned?

A. Yes.

(Testimony of Allen Brown.)

Q. I want to talk to you a minute about that hotel. When did he buy that hotel, as far as your records show?

A. September—September of 1954, I believe.

Q. How much cash did he pay for that now, down?

A. According to the statement I received from—if I may explain a little bit, he obtained the services of an accountant in Hood River to take care of the detail of the hotel and its operation, and so on. The statement submitted by that accountant and discussions that I had with him and Mr. Palermo, the original cash that was invested was in the neighborhood of \$30,000.00.

Q. And he operated it, then, a couple of years, I take it?

A. Well, he operated it from that time up until May 1st of this year, 1957.

Q. And you took care of that when you made out his income tax for 1954, 1955 and 1956? [499]

A. Yes.

Q. Now, you state that he had a \$17,000.00 loss each year?

A. Yes.

Q. Was that before or after depreciation?

A. After depreciation.

Q. He took his depreciation on that building?

A. Yes.

Q. That actually is not a \$17,000.00 cash loss, is it?

(Testimony of Allen Brown.)

A. No, it would be more in the neighborhood of \$12,000.00.

Q. Now, I take it, in all of your dealings you found Mr. Palermo truthful, and you checked his reputation for truthfulness and it was good. Did you find that he always told you the truth when you made out his income tax, Mr. Brown?

A. Yes, in the manner in which I questioned him about his income.

Q. Well, now, let us just get down to this: You were in there for an audit and I am assuming that you checked everything that you could to come up with a true net worth statement and you certainly discussed everything you could think of with Mr. Palermo, is that right? A. Yes.

Q. Now, you found that if you would ask a question on anything that he would tell you the truth about it?

A. To the best of my knowledge. [500]

Q. Yes. And you found out when you made out the returns that to the best of your knowledge he told you everything that he should in preparing the returns?

A. At the time I prepared the returns, yes.

Q. Now, I am assuming that you made out his 1954 income tax return, is that right?

A. Yes.

Mr. Bantz: Would you please mark that for Identification.

The Clerk: Plaintiff's 102.

Q. Now, handing you Plaintiff's Exhibit 102

(Testimony of Allen Brown.)

for Identification, would you please examine that, Mr. Brown. A. Yes.

Q. Now, in reference to 102 this purports to be the 1954 income tax return of Palermo and wife, is that correct? A. Yes, that is correct.

Q. And is that their return?

A. That is the return that was originally submitted, yes.

Q. And was that prepared by you?

A. Yes.

Q. And you obtained the figures from necessary work papers from Mr. Palermo, I take it?

A. From the best information available, yes.

Q. Now, during the year 1954, and I am assuming that this is correct, you have on here the total receipts of \$107,751.78, [501] is that correct?

A. That is what it says there.

Q. Now, you keep saying that it says there. I am assuming that you—did you amend this, or something? A. No, I haven't yet.

Q. You are about to amend it one of these days, aren't you? A. Yes.

Q. The truth of the matter, Mr. Brown, is that there are some receipts left off of 1954, is that correct? A. Yes.

Q. And do you have any idea how much of the receipts are unrecorded of the 1954?

A. Not without referring to my records.

Q. Well, would the figure of \$4,960.67 seem very close to it? A. Well—

Mr. Bantz: Would you mark this, please.

(Testimony of Allen Brown.)

The Clerk: Plaintiff's 103.

Q. Now, handing you Plaintiff's Exhibit 103 for Identification, and you being an accountant, I assume you can recognize what it is?

A. That appears to be an analysis of 1954 receipts, showing total deposits and so on.

Q. All right. Now, just hold on to 102 and what do you show on 102 for that year?

A. From logging operations \$107,751.78. [502]

Q. And that is the same balance that we are starting with up here, is that correct?

A. Yes.

Q. Now, you feel that the figure of about \$4,960.67 could be correct insofar as having been left off of gross receipts in 1954, Mr. Brown?

A. Yes.

Q. Now, let me ask you this: In 1954 Mr. Palermo knew he was being investigated by the Internal Revenue, didn't he?

A. Yes, he did.

Q. And so did you, didn't you?

A. Yes.

Q. And he went over it in greater care in 1954 with you to make a proper income tax return, didn't he?

A. I think he felt that, yes.

Q. But when the truth of the matter was known he didn't tell you about \$4,960.67 of unreported checks, did he?

A. Apparently not.

Q. In other words, Mr. Brown, some twenty checks totaling \$4,960.67 was neglected insofar as he was concerned?

A. Insofar as his records were concerned, yes.

(Testimony of Allen Brown.)

Q. And he gave you his records in 1954 to make his income tax return, is that right?

A. I utilized the bank statements to recap income for 1954.

Q. But you also used his expenses for 1954?

A. I recapped every check that he used to give his expenses.

Q. Mr. Brown, if he had the roughly \$5,000.00 in there in his books and shown as gross income you would put it on his income tax return, is that correct?

A. Yes, I certainly should have, but I didn't rely on his books.

Q. No. I am not questioning your integrity, Mr. Brown. I want your answer, Mr. Brown, if the material was before you either by Mr. Palermo, by his books, records and bank statements and what you had talked to him about, if he had told you and you had any record of the \$5,000.00 you would have placed it on his income tax return?

A. Yes, indeed.

Mr. Bantz: You may examine.

(Testimony of Allen Brown.)

Redirect Examination

By Mr. Moore:

Q. Now, Mr. Bantz has asked if you felt that Mr. Palermo was truthful with you with relation to the information he gave you with reference to this omission for 1954. Do you believe that Mr. Palermo was truthful with you when he gave you the information concerning the 1954 income?

A. I think he was at that time, yes.

Q. Did you also have some trouble with omissions in 1955 and 1956?

A. Yes, I did.

Q. What year? [504]

A. 1956.

Q. And what happened then?

A. Before 1956 Mr. Palermo utilized the services of a man in White Salmon who had formerly been an auditor with the State Tax Commission and he was keeping detailed records of—

Mr. Bantz: Your Honor, I want to object to going beyond the cross-examination and having what should be in the direct examination unless I have the right to go back into that, as long as we go into 1955 and 1956, and I would object as to what should be a matter of direct examination. As far as I am concerned I opened up 1954 and not any further, and I am going to object on that ground.

The Court: Well, if counsel goes into 1955 and 1956 you would have the right of cross-examination certainly.

Mr. Bantz: Yes.

(Testimony of Allen Brown.)

A. This man kept a record—a detailed record of logs sold and money coming and totaling his deposit records and totaling his payroll records for him. He was a man that I knew and I had perfect confidence in him and was a man who could do that class of work. When these recap sheets were prepared and presented to me for recap for 1956 they appeared to be reasonably accurate upon cursory examination but I again decided that I should review the bank deposit and the accounts and going into that I found that [505] there was \$13,000.00 that were not on the sheets, and I called on this man and he said that all the income that had any reference to that year was there and after reviewing these I found that these were for prior years deliveries, and he had the deposit slips and he himself had not cross-checked the deposit slips with his receipts.

Q. Was that a mistake of the gentleman you referred to or Mr. Palermo?

A. In this case it was a mistake of the gentleman referred to.

Mr. Moore: I think that is all.

Recross-Examination

By Mr. Bantz:

Q. Mr. Brown, it appears that everybody is making a mistake along here but Mr. Palermo. In 1956 when you made out his income tax return did you catch it before you made it out or after you made it out?

A. As I was making it out.

Q. But you made it out correct in 1956?

A. Yes, I think I have.

(Testimony of Allen Brown.)

Q. From what figures you got from Mr. Palermo and what figures you had?

A. Yes, that is right.

Q. Now, to begin with, let us take 1956 that you had so much trouble with. If Mr. Palermo had kept his gross receipts instead of just keeping some unreported ones as he had in [506] 1953 you wouldn't have any trouble at all would you?

A. I don't understand what you mean, sir.

Q. Let us put it this way: There has been no question about expenses insofar as this case is concerned, is that right?

A. That's right.

Q. And if Mr. Palermo had turned into an accountant of any kind, a C. P. A., lawyer-accountant, old-man accountant, or young-boy accountant, if he had turned it in a proper income tax return, is that the truth?

A. I assume that the person making the return if he accepts the return would make the return in accordance with the information he got.

Q. Yes.

A. Yes, within certain limits and I might say that some accountants would go further to prove the information than others would.

Q. Well, you have got to take somebody's word if you are asking him point blank for him to tell the truth?

A. Well, we wouldn't necessarily assume that it was so.

Q. Would you have accepted that as the truth when you, in 1954, questioned Mr. Palermo?

(Testimony of Allen Brown.)

A. I think as far as we had gone at that time I think that the general knowledge that we had of Mr. Palermo and his background and the way he did business, I think that the manner in which I asked him the questions that he answered [507] me truthfully.

Q. But he did not tell you about the \$5,000.00 which he had on gross receipts, isn't that a fact?

A. Yes, apparently that is a fact.

Q. If he had reported it you would have reported it?

A. That's right.

Q. If he had in 1950, 1951, 2 and 3 reported to Mr. Bates his gross receipts, assuming that Mr. Bates would make out his income tax the same as he did as in evidence, those gross receipts would have shown on his income tax?

A. Yes, assuming that Mr. Bates would make it out.

Q. All right, Mr. Bates was only off one cent on \$100,000.00 of gross income, wasn't he?

A. Yes.

Q. Each year, Mr. Brown, including 1956 until you got it done there was a certain amount never reported to any accountant or any individual that was responsible for making up the income tax, is that right.

A. Well, it isn't true for 1955.

Q. Well, are you prepared to talk about 1955 on the gross receipts?

A. Well, I will tell you how I prepared it if you want to know. I used bank deposits on the basis

(Testimony of Allen Brown.)

that I obtained it for every person he had done business with in 1955.

Q. In 1954 you did the same thing, didn't you?

A. No. [508]

Q. You contacted all the people, didn't you?

A. Not for 1954, Mr. Bantz.

Q. You stated on the stand that you had worked on his deposit slips to see who he had done business with?

A. I did not. I said I used the bank statements for 1954, the bank deposit slips.

Q. I think on the stand you used Exhibits 14 to 19 which are deposit slips?

A. No, that is for 1950, 1, 2, and 3.

Q. Oh, you went to the bank statements?

A. Yes, I used those years insofar as they were considered to be the indictment years.

Q. The indictment years? A. Yes.

Mr. Bantz: I will be through in just a minute, your Honor, if I may.

The Court: Yes.

Q. Handing you Plaintiff's Exhibit No. 101 which is a schedule you made out? A. Yes, sir.

Q. For 1950, \$23,130.41, is that right?

A. Yes, pretty close.

Q. 1950 is \$23,130.41 and 1951, \$22,001.48, 1952, \$31,370.52, 1953, \$14,068.68? A. Yes. [509]

Q. So far as roughly adding those up here, then from your own computation Mr. Palermo didn't report for 1950, 1951, 1952, and 1953 the sum of \$91,-151.09?

A. For four years?

(Testimony of Allen Brown.)

Q. Yes, for four years. A. That's right.

Mr. Bantz: That is all.

The Court: Any other questions?

Mr. Moore: I will ask him about two and I will be through.

The Court: I thought we might finish with this witness this morning if it isn't too long.

Reredirect Examination

By Mr. Moore:

Q. With reference to those four years how much did Mr. Palermo earn?

A. The gross receipts——

The Court: How much did he earn?

A. Gross earnings.

The Court: Yes.

Q. Yes, can you estimate them pretty closely?

A. About \$456,000. \$456,000, roughly, not adding them exactly.

The Court: He just wanted an approximation.

Q. Over \$450,000? A. Yes. [510]

Mr. Moore: That is all.

The Court: Anything else with this witness?

Mr. Bantz: No, that is all.

(Witness excused.)

The Court: Ladies and gentlemen of the jury, I have a number of other matters to take up after lunch which are not connected with this case, and so I am going to suspend this case until 2:30, and the jury will be excused in connection with this case until 2:30. The court will recess now until 1:30.

July 29, 1957, 2:35 P.M.

The Court: All right, proceed.

JOE PALERMO

the defendant herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Your name is Joe Palermo? A. Yes.

Q. And you are the defendant in this case?

A. Yes.

Q. Now, Joe, if you can't hear me you speak up?

A. I will.

Q. Where were you born, Joe? [511]

A. Victoria, B. C.

Q. When? When were you born?

A. 1909, January 9th.

Q. And when did you come to the United States?

A. I was four years old, 1913.

Q. Then did you subsequently become a naturalized citizen of the United States? A. Yes.

Q. What year was that? A. 1946.

Q. Now, after you came to the United States, I assume if you were four years old you came with your parents? A. Yes.

Q. And how many children were there, how many brothers and sisters did you have?

A. I have four brothers and two sisters.

Q. Where did you live with your parents up until you got married?

(Testimony of Joe Palermo.)

A. In Olympia, Washington.

Q. And what did your father do for a living?

A. He was a farmer.

Q. How far did you go through high school?

A. Eleven years.

Q. And where was that?

A. That was in smaller grade schools surrounding Olympia and [512] high school at Olympia.

Q. Then, after you graduated from high school what did you do? A. I didn't graduate.

The Court: Eleven years, he said.

Q. Pardon me, after you finished high school?

A. I went to work at the sawmill.

Q. At Olympia? A. At Olympia.

Q. Now, your wife has testified you were married in 1932? A. That is correct.

Q. How long did you work there before you were married?

A. I would say three and a half years—four years.

Q. Then, after you were married she testified that you worked for awhile for her father and then went back, I believe, to Olympia, is that correct?

A. Yes, correct.

Q. And you worked in the sawmill again?

A. That is right.

Q. Then, when did you go back working for her father?

A. I went back working at the sawmill about a short period, six or seven months and then I went back in the woods and worked for Mr. Zunke.

(Testimony of Joe Palermo.)

Q. That would be about 1934, I believe?

A. That would be about that time.

Q. And then your work with Mr. Zunke was doing what? [513]

A. At that time I was cutting logs and driving truck?

Q. And did you continue to do that work for him until 1947? A. Yes, I did.

Q. Where did you live during that period of 1934 to 1947?

A. At that time that was first at Port Angeles, Washington, for a period of one year. Then, from there we went to logging at Arlington, Washington. From Arlington, Washington, to Twisp and from Twisp—I might have that turned around—I believe I went to Arlington last and then from Arlington to Cle Elum, Washington.

Q. How long were you at Cle Elum?

A. Approximately five years.

Q. And, then, from Cle Elum is that where you went to White Salmon? A. Yes.

Q. Now, your father-in-law testified that up until the early '40's your income had been rather small from him and that thereafter you earned about \$4,500.00 per year; is that about right?

A. That is about correct.

Q. Then, in 1947, at the start of that year, you were driving truck for Mr. Zunke, is that correct?

A. Yes, that is correct.

Q. And living down at White Salmon?

A. That's right. [514]

(Testimony of Joe Palermo.)

Q. Now, what did you have that you acquired from Mr. Zunke in order to go into the logging business?

A. I acquired a truck and a trailer and a loader and some tools and accessories you might need, like tongs and so forth.

Q. And did you pay him anything as a down payment on that? A. I did not.

Q. Do you recall what you were supposed to pay him for the full purchase price?

A. I didn't get that.

Q. What was the total purchase price of the stuff you were buying from Mr. Zunke?

A. The truck was \$3,000.00 and it was on a contract and I couldn't remember the payments on it, and the loader and the trailer, I can't give you a definite price on that, I don't remember.

Q. The truck, you took over the contract that he was already buying it on? A. Yes.

Q. Did you have any stumpage at that time?

A. I didn't have any of my own.

Q. I don't know if the term has been properly defined here, but would you tell the jury what stumpage is?

A. Well, stumpage is what we call it up there, it is what we cut up and you got the trees embodying the logs and at [515] that time when we were cutting the stumpage if it was five or six dollars per thousand that is what we paid when we hauled those logs to the mill, it would vary from that, some

(Testimony of Joe Palermo.)

would be five dollars and some would be six dollars and it would be more, that was how we paid,

The Court: Stumpage is standing timber; is it standing up?

A. Yes.

The Court: Stumpage means standing timber that you buy?

A. Yes.

The Court: All right.

Q. When did you acquire the standing timber or stumpage for yourself?

A. Well, I started acquiring timber of my own, oh, it was about two years later that I started buying timber and land.

Q. During that interval until you acquired your own stumpage what were you doing; hauling logs for somebody else?

A. No, I was buying stumpage.

Q. You were buying timber from loggers and selling it?

A. Yes.

Q. Now, approximately how many people did you have working for you during the period, say, from the time you started until the end of 1953, during the year?

A. When I started I only had four and it lasted for—I had [516] four of my own and I hired the skidding, the skidding of the logs I hired out and it wasn't my employees, and later I ended up with a period of about four or five years with six employees.

(Testimony of Joe Palermo.)

Q. And what did you, say, at the end of 1953, have in the way of logging equipment?

A. All of it?

Q. Yes, if you recall.

A. I had a "cat," a loader, two trucks, and that was about the limit of the equipment.

Q. Now, from the time that you left high school, Mr. Palermo, until you went into business on your own, did you do any other kind of work other than the driving truck or cutting timber or things like that?

A. No, I didn't, outside of sawmill work.

Q. And you worked in a sawmill, working in a sawmill?

A. Yes.

Q. What kind of work was it that you were doing, say, in the sawmill specifically?

A. Well, when I started in the sawmill I was handling lumber on the green chain and when I left I was doing odd work, and they had only four days a week work. At that time I was driving a carrier and when I quit I was helping with lumber on the green chain also in my spare time.

Q. Now, when you started in business for yourself was your [517] son working for you then?

A. Not at the time that I started.

Q. Did he subsequently?

A. It was later years.

Q. He worked for you for awhile?

A. Yes.

Q. Say, in 1947 were both your son and your daughter living at home with you?

A. Pardon?

(Testimony of Joe Palermo.)

Q. In 1947 were both your son and your daughter living at home with you? A. Yes.

Q. And, then, since that time your son has married and gone out on his own?

A. Yes, that's right.

Q. And your daughter still lives at home?

A. That's right.

Q. And did you own your home in 1947 when you started in business? A. Yes, I did.

Q. And when had you acquired that home?

A. That home I acquired in I believe it would be about 1943 or 4.

Q. And had you completed paying for it in 1947?

A. Yes. [518]

Q. Do you recall how much you had paid for that home? A. \$2,000.00.

Q. \$2,000.00? A. Yes, \$2,000.00.

Q. Now, subsequently you did acquire another home, did you not? A. Yes, I did.

Q. And when was that?

A. I believe it was around 1950.

Q. And do you recall what you paid for it?

A. Pardon?

Q. How much did you pay for it?

A. It was approximately \$10,000.00. I don't remember whether it was a little over. It wasn't under but it might have been a little over because there was a lot involved, and I don't remember whether I bought it at that time or not.

Q. Was this a new home? A. No.

Q. And what construction?

(Testimony of Joe Palermo.)

A. Frame construction.

Q. And you have completed paying for that, have you not? A. Yes, I have.

Q. Now, you also have acquired some homes for rental purposes, have you not? [519]

A. Yes, I did.

Q. And those are at White Salmon?

A. They were.

Q. Do you still have them? A. No.

Q. Now, the other day I believe there was some reference made to the fact that you at one time owned a Cadillac. Is that correct?

Mr. Bantz: I didn't get that, Mr. Moore; what was that?

Mr. Moore: Owned a Cadillac.

The Court: How was that; I didn't get that.

Q. You at one time owned a Cadillac?

A. Yes.

Q. Do you recall when it was that you purchased the Cadillac? A. That was in 1953.

The Clerk: I am marking the Defendant's 104 and 105, your Honor.

Q. Handing you Defendant's Exhibit for Identification No. 104, would you state what that is?

A. That is a conditional sales contract on a Cadillac, 1953.

Q. And handing you Defendant's Exhibit for Identification No. 105, would you state what that is?

A. That is a payment on the car, \$1,577.00 signed by Mr. Palermo.

(Testimony of Joe Palermo.)

Q. That was the down payment? [520]

A. The down payment with the old car.

Mr. Bantz: I didn't hear the last statement. That was the down payment.

(Answer read.)

Mr. Moore: I will offer in evidence 104 and 105.

Mr. Bantz: No objection.

The Court: Admitted.

(Whereupon, said documents were admitted in evidence as Defendant's Exhibits No. 104 and 105.)

Q. Handing you Defendant's Exhibit 104 and Plaintiff's Exhibit 23, Mr. Palermo, that conditional sales contract is dated what date?

A. The 6th day of February, 1953.

Q. Showing you Plaintiff's Exhibit 23, which is the bank statement for your account at the White Salmon Branch of the National Bank of Commerce, what was the bank balance in your checking account on February 6th, 1953? A. \$55,606.62.

Q. Now, this conditional sales contract shows a total time price of \$5,328.31, is that not true?

A. Correct.

Q. And included in that price is the cost of car insurance at \$121.00? [521]

A. That is correct.

Q. And a finance charge of \$77.28?

A. That's right.

(Testimony of Joe Palermo.)

Q. And this provides for payment of twelve monthly instalments of \$124.69?

A. That's right.

Q. This contract also shows, Mr. Palermo, that there was a trade in of \$2,255.03. Do you know what it was that you traded in on that car?

A. I believe it was a '51 Oldsmobile.

Q. During the course of your acquiring various properties or equipment have you purchased other items by conditional sales contract, Mr. Palermo?

A. Yes, I have.

Q. What else have you purchased?

A. Well, I purchased trucks.

Q. Trucks?

A. And "cats" and loaders and incidentals for the house.

Q. Such as?

A. Refrigerators, electrical stoves, deepfreeze.

Q. During what years did you purchase trucks on conditional sales contracts?

A. 1950-1947 I had this one to pay off that I bought from Mr. Zunke, in 1959 I believe.

Q. 1949? [522] A. Pardon?

Q. 1949?

A. 1949, I believe, I bought another one on conditional sales contract and in 1953 or 4—I think it was '54 that I bought another one on conditional sales contract.

Q. And you say you bought a loader?

A. Yes.

Q. When did you buy that?

(Testimony of Joe Palermo.)

A. That was the year—I couldn't tell but I believe it would be right around 1950—1949 or 1950.

Q. And when did you buy the "cat"?

A. In 19—the first was in 1949 and the last one in 1951.

The Clerk: Marking Defendant's 106.

Q. Handing you Defendant's Exhibit for Identification 106, would you state what that is?

A. That is a chattel mortgage on a 1953 International Short Logger.

Q. Dated what? Pardon me, it is on the other side.

A. Dated August 12th, 1953.

Q. And was that executed by you as a mortgage or through the acquisition of the truck; did you go out and borrow money on the truck or was that to buy it?

A. No, it came from the same company.

Q. You bought the truck from Morris Nelson Company? [523]

A. Yes.

Mr. Moore: I move the admission of 106 for Identification.

Mr. Bantz: This is July 10, 1953, is that right?

Mr. Moore: Yes, it is a mistake, your Honor, instead of August 12, 1953, it is July 10, 1953.

The Court: There is no objection?

Mr. Bantz: No objection.

The Court: It will be admitted.

(Whereupon, said chattel mortgage was admitted in evidence as Defendant's Exhibit No. 106.)

The Clerk: Marking Defendant's 107.

(Testimony of Joe Palermo.)

Q. Handing you Defendant's 107, and showing you Defendant's Exhibit 106, would you state what 107 is?

A. It is a check made out to Morris Nelson Company for \$6,000.00 on July 10, 1953.

Q. And what was that for?

A. That was for that truck.

Q. That is the cash down payment that went with the acquisition of the truck? A. Yes.

Mr. Bantz: No objection.

The Court: It will be admitted. That is [524] 107?

The Clerk: 107, your Honor.

(Whereupon, said check was admitted in evidence as Defendant's Exhibit No. 107.)

Mr. Moore: Your Honor, we would like to have these identified. I have shown them to Mr. Bantz. These are—as I am sure that the witness will testify because there is no question about them—these are his duplicate deposit slips on the right hand and in this box are cancelled checks and bank statements for the years in question, and I thought as long as we weren't going to make any recap on them we might put them in as a single exhibit and these as a single exhibit and there will be no need of taking them apart.

Mr. Bantz: I have no objection.

The Clerk: 108 is the duplicate deposit slips and 109 is cancelled checks and bank statements.

The Court: Do you mean to say that there is no

(Testimony of Joe Palermo.)

objection to that method of marking them of their admission?

Mr. Bantz: I have no objection—Did you ask the witness if he changed them. I have no objection if he hasn't changed them on his original records, your Honor.

Mr. Moore: I will ask him.

Q. Mr. Palermo, handing you Defendant's 108 would you state what those articles are? [525]

A. These are bank deposit slips to the Security State Bank at White Salmon.

Q. Those are duplicate deposit slips, are they not?

A. Yes.

Q. And they cover the Security State Bank and it is the deposit slips also of its successor in interest the National Bank of Commerce of White Salmon?

A. That's right.

Q. Are they for the period starting May 24, 1948 and——

Mr. Moore: I believe, your Honor, one of these goes on into 1954 but we would terminate it as of December 31, 1953, as far as this case is concerned.

Q. Now, these duplicate deposit slips, Mr. Palermo, are not a complete copy of the deposit slips that Mr. Babb put in evidence, are they?

A. No.

Q. There are some omissions?

A. That's right.

Q. But these are the deposit slips which you had in your possession when Mr. Blankenship contacted you?

A. Yes.

(Testimony of Joe Palermo.)

Q. And these are the duplicate slips that you delivered to me for turning over to Mr. Blankenship?

A. That is right.

Q. And there have been no changes in these slips since that [526] time?

A. I don't believe so.

Mr. Bantz: No objection.

The Court: They will be admitted. 108.

(Whereupon, said deposit slips were admitted in evidence as Defendant's Exhibit 108.)

Q. And handing you Defendant's Exhibit 109 for Identification, would you state what they are?

A. Those are cancelled checks made out in Joe and Bertha Palermo's name.

Q. Well, those are cancelled checks and bank statements, are they not? A. Yes.

Q. In the Security State Bank? A. Yes.

Q. And also its successor the National Bank of Commerce? A. Yes.

Q. And they are bundled according to the years, are they not? A. They are.

Q. And these are all the cancelled checks and bank statements that you had in your possession for the years '48 through '53?

A. That's right. [527]

Q. And which you delivered to me for delivery to or for viewing by Mr. Simonson and Mr. Blankenship? A. That's right.

Q. And to your knowledge there has been no alterations or deletions? A. That's right.

(Testimony of Joe Palermo.)

Q. Now, incidentally, there are some of the monthly statements are not present, is that true?

A. That is correct.

Mr. Moore: I can advise the Court that that is the situation in 1951 that I know of. I request admission in evidence of 109.

The Court: Do you wish to interrogate?

Mr. Bantz: I do not; no, your Honor.

The Court: They will be admitted then.

(Whereupon, cancelled checks and bank statements admitted in evidence as Defendant's Exhibit No. 109.)

Q. Handing you Defendant's Exhibit No. 98 for Identification, would you state what that is, Mr. Palermo?

A. Well, this is where I kept my records.

Q. For what year? A. For 1950.

Q. And handing you Defendant's Exhibit No. 99 for Identification, [528] what is that?

A. That is for 1951.

Q. That is your record book for 1951?

A. That is correct.

Q. And handing you Defendant's Exhibit 100 for Identification, what is that?

A. That is the record for 1952 and 1953.

Q. And it also includes 1949, does it?

A. Yes, it is right here on the front page, yes.

Mr. Bantz: May I ask him one question: Have you made any corrections, additions or deletions on

(Testimony of Joe Palermo.)

these records since you have had them as your records? A. No, I have not.

Mr. Bantz: I have no objection, your Honor.

The Court: They will be admitted. 98, 100, 99.

(Whereupon, said documents were admitted in evidence as Defendant's Exhibits Nos. 98, 99 and 100.)

Mr. Moore: I think that the record should show that in some of these there are red check marks that Mr. Brown testified he made in going over them.

Q. Now, Mr. Palermo, when you first went into business for yourself did you acquire the services of a bookkeeper or accountant to set up your books?

A. No, I didn't. [529]

Q. Did you have any assistance in setting them up at all? A. No.

Q. And when you continued in business, let us say, through the end of 1953, who made the entries in these books? A. Made what entries?

Q. Who made the entries in these books?

A. I didn't get that, I am sorry.

Q. Who made the entries in these books here, and with reference to year 1951 where it says "Earnings Gross" and then there is a name and a date and a figure opposite it, that is the record which you kept?

A. That is right.

Q. And in addition to "Earnings Gross" what else did you enter in these books?

A. Well, the labor on the employees for one and how much they received each payday which was

(Testimony of Joe Palermo.)

every two weeks, and stumpage bought and gross earnings and some memorandas.

Q. In general your books then except for these added memos reflect stumpage purchases by you and gross earnings and employees pay checks figures?

A. That is correct.

Q. Now, with reference to the records that are in here in Exhibits 98, 99 and 100, I will hand you 98, with reference to the figures setting forth gross earnings, when would you make those entries in the books, during the year [530] or at the end of the year?

A. Of the year, do you mean?

Q. Well, now, like on that exhibit which you are looking at, Exhibit 98, there is list of gross earnings there, is there not?

A. Yes.

Q. When would you make the entries in those books?

A. Well, the entries were made in—mostly in the evenings, maybe on Sundays or times that I would probably have time to look at them and work on them or when I would receive checks, sometimes one check or maybe more than one check and—well, there is different times.

Q. You would make them during the year, however?

A. Yes, that's right.

Q. And that is at various times?

A. Yes, that's right.

Q. Now, during this period up to the end of 1953, what was your week's work, I mean were you working four days a week or five days a week or six or seven or what?

(Testimony of Joe Palermo.)

A. Well, I was working always as a rule six days a week and most of the time there is always some repair work or something to do which has taken up a few hours on Sundays and evenings.

Q. And when you were working what time would you leave? What time would you leave in the [531] morning?

A. During the winter we would generally leave about six-thirty and during the summer we would leave home between—and depending upon the weather and how hot—sometimes at five o'clock and five-thirty.

Q. And what time would you quit work?

A. We generally worked until five o'clock unless there was something to do to hold us over a little bit.

Q. And when you quit working at five o'clock were you then at home at five o'clock?

A. No, I generally wasn't always at home at five o'clock, no, it generally took one hour to go home yet.

Q. Then, in addition to making these entries in the books, what else did you do during the evenings with reference to your logging business?

A. I worked in the woods and loaded.

Q. No, I mean did you write your checks in the evenings also? A. Yes.

Q. Is that when you took care of that?

A. Yes, as a rule I would generally write the checks and pay my current bills and put the entries of the checks I had probably on the same night at the same time.

Q. Now, your wife testified the other day that

(Testimony of Joe Palermo.)

you had a room with a place where you kept these books and things, is that correct?

A. That is correct. [532]

Q. And say that you were going to come home in an evening and working home, say, you received some checks and owed somebody some money that you had to pay, what would you do; would you take your checks and go in and do something with them?

A. I generally took the checks and put them up in my room and leave them until there was a time that I had time to go over them and I would make entries and pay bills probably at the same time.

Q. And would you spend a great deal of time on this every night?

A. Well, that would depend. There were sometimes that I only spent ten or fifteen minutes and other times spent one hour, and if there was an off day or a Sunday I would probably be able to spend one half or more of a morning.

Q. Now, you know at the present time, of course, Mr. Palermo, that all of the money which you received in 1950 through 1953 didn't get into your books here, Exhibits 98, 99, and 100, don't you?

A. Yes, I do.

Q. And you know also that all of those receipts didn't get on your income tax returns, is that correct?

A. That is correct.

Q. Now, with reference to your making out your income tax returns, when did you first go to Mr. Bates? [533]

A. I believe the first time that I approached Mr.

(Testimony of Joe Palermo.)

Bates about making out my income tax was in the first of the year 1948, I believe. I believe that is right, 1948 or 1947.

Q. And did you see him down at his real estate office? A. Yes.

Q. And did you discuss with him what it was that he wanted from you in order to make out your income tax return?

A. I didn't discuss it with him at the time.

Q. Did you go in there prepared to have him make out your income tax return?

A. Well, I went down believing I was prepared. When I first went down I didn't know what to bring exactly and so I thought I would bring what I could. I had at that time I believe the entries or the books and bank deposits and I brought them down, too.

Q. Your bank deposit slips?

A. I beg your pardon?

Q. Your bank deposit slips?

A. Yes, my bank deposit slips.

Q. And what else; was there anything else?

A. Well, I don't remember what else it was that I did bring down.

Q. And did you give those items to Mr. Bates?

A. I didn't hand them to him. I took them into his office where he does his work and laid them on his desk. He [534] looked at them but he did not need them and he asked me to go home and figure them out and bring it down in a figure.

Q. Do you mean he advised you that he did not want the bank deposits slips or anything else?

(Testimony of Joe Palermo.)

A. Yes, he did.

Q. And then I assume you went home and added up the things that he requested? A. I did.

Q. Now, when you added these items up for Mr. Bates insofar as your earnings are concerned what did you use to get the total of your gross earnings for that year?

A. What I had entered in the books I added up each column and put it down and took it down to him.

Q. And did you do that every year thereafter through your 1953 return? A. I did.

Q. And did you make use of your cancelled checks in making the totals for him of what your expenses had been? A. No.

Q. What did you use?

A. I always used a slip from whatever we bought and added up each slip.

Q. So that during these four years you didn't use your checks at all? [535]

A. I didn't use the checks at all. I just used the slips.

Q. Now, when you made these deliveries to Mr. Bates in 1951 for the 1950 tax return, as I understand it, you took the items in Exhibit 98 insofar as your gross earnings are concerned and totaled those items and gave that to Mr. Bates as your gross earnings? A. I did.

Q. Now, this is correct, is it not, that there is a page in the back of this book which includes gross earnings? A. Yes, for 1950.

(Testimony of Joe Palermo.)

Q. For 1950? A. Yes, uh-huh.

Q. Now, at the time that you delivered to Mr. Bates in January or February or March, 1951, whenever you gave this information to him for your 1950 return, according to the testimony here, you must have given him a slip of paper which said that your gross earnings were \$66,090.94, I believe it is—may I see 3, 4, 5 and 6—yes, according to your tax return and I believe that we have confirmed that that is the figure to which those figures in Exhibit 98 total, you must have given him a slip of paper that had that figure on it? A. Yes, I did.

Q. As your gross returns? A. I did. [536]

Q. At the time that you delivered those to Mr. Bates did you know that that sum of \$66,090.94 was not the total amount of money which you had received during the year?

A. Well, I was to believe that it was.

Q. You believed that it was? A. Yes.

Q. And when you signed Plaintiff's Exhibit 3, being your 1950 income tax return, and sent a check to the Internal Revenue Service for the tax on that, did you believe that the return was correct?

A. Yes, I did believe that it was.

Q. Did you believe that your gross receipts reflected on that return and the net receipts reflected on that return and the tax computed on that return were correct? A. I did.

Q. Did you sign this return and file it with the Internal Revenue Service with the intent to evade the income taxes due for the year 1950?

(Testimony of Joe Palermo.)

A. I did not.

Q. Now, with reference to the year 1951, Mr. Palermo, according to Defendant's Exhibit 99 on pages 1 and 2, there are set forth "Earnings Gross," that is correct, is it?

A. That is correct.

Q. And according to the testimony and evidence that is in [537] at the present time, you apparently totaled this page?

A. I did.

Q. And page 2?

A. Yes.

Q. Pages 1 and 2?

A. Yes.

Q. And delivered the total to Mr. Bates as your gross earnings for the year 1951?

A. That is correct.

Q. That is correct, is that right?

A. That is correct, yes, that's right.

Q. And according to the 1951 income tax return that figure was \$98,178.22, is that correct?

A. That is correct.

Q. Now, at the time that you delivered the information to Mr. Bates that your gross returns for 1951 came to \$98,178.22, did you believe that figure to be correct?

A. I did.

Q. And at the time that you signed the 1951 return for filing with the Internal Revenue Service, did you believe that figure of \$98,178.22 to be the correct total of your gross earnings for the year?

A. I did.

Q. And when you signed this return for filing with the Internal Revenue Service, did you also be-

(Testimony of Joe Palermo.)

lieve that your [538] net income as reflected on Exhibit 4, being your 1951 income tax return, and the tax computed thereon was correct? A. I did.

Q. With reference to the 1952, Mr. Palermo, on Exhibit 100, on page 34 there is a heading entitled "Gross Earning 1952," that is correct, is it not?

A. Yes.

Q. Those were entries which you made?

A. That's right.

Q. When you were providing information to Mr. Bates to do your income tax return for 1952, did you total the figures that are shown on page 34?

A. I did.

Q. And delivered the same to Mr. Bates?

A. Yes, I did.

Q. And at the time that you totaled those figures and delivered the same to Mr. Bates, did you believe that they represented the total of your gross earnings for 1952? A. I did.

Q. Now, according to your return the figure that you must have given to Mr. Bates is \$97,952.27, is that not correct? A. That is correct.

Q. And that is what you believed to be the correct amount? [539] A. It was.

Q. And when you signed your 1952 income tax return, which is Plaintiff's Exhibit 5, for filing with the Internal Revenue Service, did you at that time, Mr. Palermo, believe that \$97,952.27 was your correct gross earnings for 1952? A. I did.

Q. And at that same time did you also believe that your net profit for 1952 as reflected on the re-

(Testimony of Joe Palermo.)

turn and the income tax computed on that net was correct? A. I did.

Q. With reference to 1953, on Exhibit 100, pages 47 and 48 are two pages entitled "Gross Earnings 1953," is that not correct? A. That is correct.

Q. And according to the evidence that we have at the present time apparently you totaled the figures on these two pages and gave them to Mr. Bates as your gross earnings for 1953? A. Yes.

Q. Now, at the time that you delivered that information of your gross earnings for 1953 to Mr. Bates for the preparation of your 1953 income tax return did you believe that that total which you delivered to him was correct? A. I did. [540]

Q. As being the correct gross that you had received during the year? A. Yes.

Q. And according to Exhibit 6, which is your 1953 income tax return, that figure is \$102,901.72?

A. That is correct.

Q. Now, at the time that you signed this return for 1953, Mr. Palermo, for filing with the Internal Revenue Service did you believe that the figure of \$102,901.72, as shown on the return as your gross earnings, were the correct gross earnings?

A. That is right.

Q. And at the time that you signed this return for filing with the Internal Revenue Service did you believe that the net income reflected on your return for 1953 and the income tax computed on that net return were correct? A. I did.

Q. With reference to these four years, Mr. Pa-

(Testimony of Joe Palermo.)

lermo, 1950, 1, 2 and '53, and the tax returns which were filed in the Internal Revenue office by or for you, did you at any time file any one of these returns Exhibits 3, 4, 5 or 6 with intent to evade taxes due to the United States Government on your income?

A. I did not.

Q. I think there is in evidence here at the present time [541] exhibits demonstrating that for the years 1948 and 1949 your income tax returns did not clearly reflect the total of your gross earnings. With reference to those two years did you compile the information for Mr. Bates as to your gross earnings in the same manner as you did for 1950, 1, 2 and 3?

A. For what years was that?

Q. 1948 and 1949. A. Yes.

Q. You added them up out of the book?

A. Yes, I did.

Q. And when you delivered the information to Mr. Bates for those two years did you believe that the totals were correct that you gave him for your gross earnings? A. I did. I did.

Q. And when you signed your returns for 1948 and 1949 for filing with the Internal Revenue Service did you believe those returns correctly stated your gross income, your net income and the income tax due? A. I sure did.

Q. During the time that you have been in business, Mr. Palermo, there have been some of the checks according to the evidence here which were not deposited in either your bank account at White

(Testimony of Joe Palermo.)

Salmon or the bank account at Stevenson; you have heard that testimony, have you not? [542]

A. Yes, I have.

Q. And you are aware of the fact that some of those checks did not get deposited? A. I am.

Q. Now, while you were doing this work in 1950 to 1953, this logging, did you have cash to make any cash purchases for your logging business?

A. Cash purchases?

Q. Yes. A. Not too much.

Q. What did you purchase for cash?

A. The cash would be—would be parts or something like that would probably be out of our town.

Q. Now, where would you usually go or send for parts of items that you would have to pay cash for?

A. Portland was the main town. Portland and Vancouver.

Q. Portland, Oregon, and Vancouver, Washington? A. Yes.

Q. And those purchases would be made for something that you paid cash for?

A. Well, as a rule it would be the Alaska Junk or—I forgot the other place. There was times that we would go down there to buy accessories or a used motor or something like that and we would just generally always pay for them in cash because the people down there didn't know me [543] and I didn't know them too good.

Q. You say those people down there did not know you?

(Testimony of Joe Palermo.)

A. Well, they do now but they didn't at that time.

Q. And with reference to the purchase of other items of equipment or supplies for your logging business, how did you pay for those, by cash or by check, other of the items other than what we have just been talking about?

A. Paid by check. Those that I did not pay by cash I always paid by check.

Q. And those would have been out of what bank?

A. The National Bank of Commerce, and——

Q. At White Salmon?

A. And—Yes, White Salmon. And the Stevenson Bank up to 1952 or something like that.

Q. Well, then, the normal course of the operation of your business in making payments in the immediate area of White Salmon and Bingen, whether it was for repairs or salaries to your men or supplies or anything else, did you make the majority of those payments by cash or check? A. By check.

Q. With reference to your personal expenditures for your items which you purchased for day to day living and up in your home and your purchase of a car or for anything else, were those by cash or by check? A. By check. [544]

Q. And all of those checks which you issue, as I understand it, were either out of the White Salmon Branch of the National Bank of Commerce or out of the Stevenson Bank?

A. Yes, that is correct.

Q. Now, when did you set up this account at

(Testimony of Joe Palermo.)

Stevenson? A. I believe that was in 1948.

Q. And what was the reason for getting a bank account in Stevenson?

A. Well, at the time that I started at Stevenson I bought—I bought that old “cat” the first one that I had bought and I had to have \$2,000.00 to pay for it and the party that I bought it from he co-signed the note at the Stevenson bank for me to pay him off at \$500.00 per month until paid which I had done, and in the course of the transaction there they asked me to do some business with them, which I did.

Q. And so you maintained that bank account actively until August of 1952?

A. In 1952, yes.

Q. And then I believe the evidence shows that thereafter you did make deposits but the bank account wasn’t active?

A. That is right, uh-huh.

Q. With reference to the two banks during the time that you had these two bank accounts, in which bank did you place most of your money? [545]

A. The National Bank of Commerce at White Salmon.

Q. And since you closed up the Bank of Stevenson account up through the end of 1953 the only bank account you had—checking account was at White Salmon? A. That is correct.

Q. And up until the end of 1953 the only other account you had was this savings account down at the Bank of Stevenson? A. That is correct.

Q. Now, in the course of your operations from

(Testimony of Joe Palermo.)

1948 to the end of 1953 you purchased a home and the rental units you have referred to and some equipment and some household goods and furnishings and did you buy in addition to that some stock?

A. Some stock?

Q. Yes, some stock? A. Yes.

Q. And what was that in?

A. That was in a mine in Idaho.

Q. And what kind of mine was it?

A. Well, it was supposed to have been a gold mine and silver.

Q. And I assume that there hasn't been much gold or silver out of it. Who were the officers of that corporation that you bought stock in; where did they live?

A. At White Salmon. [546]

Q. They lived at White Salmon?

A. Yes, White Salmon.

Q. And the President is a White Salmon man, is he not?

A. That is correct.

Q. And how much did you put in that stock?

A. \$5,000.00.

Q. Now, when you bought timber stumpage after you got into business, for instance, in Exhibit 98 I notice a stumpage figure of \$11,090.30 total with checks to various—or payments apparently to various individuals, is that stumpage?

A. That is right.

Q. Now, in the acquisition of stumpage from 1948 to 1953 how did you pay for that stumpage; by cash or by check?

A. By check.

Mr. Moore: May I have 86, please.

(Testimony of Joe Palermo.)

Q. Now, Mr. Palermo, handing you Exhibit 86 and also Exhibit 98, Mr. Simonson when he was on the stand referred to the fact that according to his Exhibit 86 there was recorded in the book a \$900.00 item from S. D. S. Lumber Company in 1950 and that he had only been able to find cancelled checks for \$148.50. Now, according to Exhibit 98 your figures under gross earnings on the last page of that exhibit you will see S. D. S. to November 1.

A. Yes. [547]

Q. Do you have any idea why that shows \$900.00 in your book and apparently no check was ever given to you for \$900.00 or for any more than \$148.50 during that period of time?

A. Well, I don't know unless it could have been that I could have estimated what I had coming at S. D. S. and entered it in the book, which it could have been one or the other. In fact, I couldn't remember it.

Q. You don't know, is that correct?

A. No, I don't know.

Q. When you were keeping these books, Mr. Palermo, and keeping the gross earnings reflected in Exhibits 98, 99 and 100, was it your intention to include under the gross earnings all money that you received in the logging business?

A. I presume that I did.

Mr. Bantz: Your Honor, I request that it be stricken; it isn't a responsive answer.

The Court: Well, I am not sure that it is. What was the question?

(Testimony of Joe Palermo.)

(Last question and answer read.)

The Court: Well, I will let that stand.

Q. Was it your intention at any time that you made the entries or received checks to omit checks from your list of gross earnings in these exhibits; did you ever intend to omit checks from that [548] listing? A. Did I what?

Mr. Moore: Pardon me? I will get up here so you can hear me.

The Court: Did you intend to leave any out of your books?

A. No, I did not intend to leave any of them out.

The Court: That is what you wanted to know, isn't it?

Mr. Moore: That is what I wanted to know.

The Court: All right. We will take a ten minute recess.

(Whereupon, after the usual afternoon recess, proceedings were resumed as follows:)

Q. (By Mr. Moore): Mr. Palermo, there has been some testimony here that you purchased a hotel in 1954, is that correct? A. That is correct.

Q. Where is that hotel?

A. Hood River, Oregon.

Q. That is, I believe, right across the river, isn't it, from White Salmon?

A. About—between two and two and a half miles from White Salmon.

Q. Before buying that hotel did you confer with

(Testimony of Joe Palermo.)

anyone concerning the record of its past profit or losses? A. No, I didn't.

Q. Did you have anyone investigate that on your behalf before [549] you purchased it?

A. No, I didn't.

Q. With reference to the information that you gave to Mr. Brown concerning your gross earnings for 1954, when you gave him that information did you believe it to be true or false? A. True.

Q. Did you know what it was that was subsequently discovered to have been omitted from the gross earnings? A. I didn't.

Q. Do you know now? A. I heard it.

Q. Did Mr. Brown tell you what it was?

A. I can't recall but we did talk over some amount but I didn't catch the amount.

Q. With reference to the entries that you made in Exhibits 98, 99 and 100 for gross earnings, were these entries always made from checks that you had in your hands at the time or were the entries made at other times also?

A. They were made at both times.

Q. When would you have occasion to make an entry in gross earnings in your books when you wouldn't have a check there, what would you put in?

A. Sometimes I would put in an estimate of what I had coming.

Q. You would put in your book what you yourself would [550] estimate to be owing from that company? A. Two weeks period, yes.

Q. Now, in 1954 in the fall did you receive a let-

(Testimony of Joe Palermo.)

ter from Mr. Don Blankenship that he was going to come and see you?

A. I received a letter in the fall of 1954 that he was coming to see me.

Q. And then he subsequently came to see you?

A. Yes, he did.

Q. What was the substance of his meeting with you; what did he ask you or say to you or what did you say to him?

A. At that time he asked where I was born to begin with, where I had lived and approximately how much insurance I had and if I had any of my withholding statements at the house, which I did not, and——

Q. Did you advise him where they were?

A. Pardon?

Q. Did you advise him where they were?

A. Yes, I did.

Q. Where were they?

A. At Mr. Bates' office.

Q. All right, go ahead.

A. And he asked about how much equipment I had and about what I thought I was making gross, which I couldn't give a definite answer, and so we—I believe—— [551]

Q. Did he ask you in relation to any particular years?

A. Well, I don't remember offhand but I believe it was—it was beginning about '49 I believe or 1950 up to 1953.

Q. Up through 1953?

A. Yes.

(Testimony of Joe Palermo.)

Q. And did he ask you with whom you had done business during that time? A. Yes, he did.

Q. And did you tell him? A. Yes, I did.

Q. And did he ask concerning whether or not you had an account at the Bank of Stevenson?

A. I believe he mentioned that.

Q. Did he ask you anything about how much you had down there?

A. I don't remember offhand whether he asked me how much because I wasn't sure how much, I knew but I was sure that he was going down I believe in our conversation and I believe he was going to ask and found out down there.

Q. Did he ask you how much money you had in the White Salmon Bank? A. Yes, he did.

Q. And did you tell him?

A. I told him that he—that Mr. Blankenship had the figure—it was the first of the year and I went upstairs and found mine from January and they both were alike, the figures. [552]

Q. And did he ask you anything else as to your assets, any property that you had during that period?

A. Well, he asked me about the assets I had, yes.

Q. And did you tell him? A. Yes, I did.

Q. Has there been any period, anything since you met Mr. Blankenship and subsequently Mr. Simonson, when you did not provide them with everything you had that they requested?

A. I haven't anything left so I am sure that he has everything that I had.

(Testimony of Joe Palermo.)

Mr. Moore: I think that is all.

Cross-Examination

By Mr. Bantz:

Q. Mr. Palermo, getting back to when we started here, when Mr. Moore started, you stated that you had some rental homes. Where are those rental homes? A. At White Salmon, Washington.

Q. And how many did you have?

A. There periods of years where I had gotten rid of some.

Q. Well, during the period 1952 to 1953 did you have three? A. I had four.

Q. All right, did you keep track of rentals on those yourself, did people pay you?

A. Yes. Yes. [553]

Q. And you marked the rentals down in your books?

A. I believe—well, I don't believe I did.

Q. Well, you kept track of them, didn't you?

A. Well, I had the figures of them in a memo book.

Q. Well, you did turn in something to Mr. Bates on which you kept track?

A. No, I didn't. I just told him.

Q. You just told him?

A. I told him what I had in my own book. I had a small book in my pocket.

Q. But you did tell Mr. Bates about it?

A. Yes, I am sure that I did.

(Testimony of Joe Palermo.)

Q. Now, you stated in 1953 you traded in an Oldsmobile and purchased a Cadillac—may I have 104 and 105, please—and you bought it on conditional sales contract, is that correct?

A. That is correct.

Q. You paid the sum of \$1,577.00 in cash, plus your old car, and then you owed a balance to the finance company at that time, is that right?

A. That is correct.

Q. And during that time I believe you stated that when you bought that car you had \$55,000.00 in the bank in cash, is that correct?

A. I believe that would be correct. [554]

Q. Now, also in addition then to the \$55,000.00 you had ten thousand plus some dollars for interest in the Stevenson Bank, is that correct?

A. That is correct.

Q. In other words, you had \$65,000.00 in cash when you bought it on a conditional sales contract?

A. That is correct.

Q. Now, during the year 1953 when you bought this car did you know the least amount of money that you had in your checking account at the National Bank of Commerce at White Salmon, did you know probably the least amount you would have?

A. Well, at that particular time I probably didn't.

Q. Well, didn't you keep very close track of the cash you had on hand in your checking account stubs at home, Mr. Palermo?

A. Well, as a rule I didn't too much.

(Testimony of Joe Palermo.)

Q. Well, actually, now, didn't your checking account stubs just generally within a few dollars always coincide with what the bank statement said at the end of the month, didn't it? A. I presume.

Q. In other words, you knew every day pretty close to how much cash you had at the bank?

A. Well, I didn't always know that. [555]

Q. Now, just looking here just referring to my own notes, I notice in August 26, 1953, you were down to \$48,102 and on November 12th you had \$88,552.00, and it varied between that during the year 1953. Now, that of course did not include the \$10,000.00 at Stevenson, is that correct?

Mr. Moore: You have got to answer, Mr. Palermo.

Mr. Bantz: You have got to answer so that he can take it down. A. Yes.

Q. So that during the year you had as high as \$98,000.00 in cash on hand and as low as \$58,000.00, is that right?

A. That could be. I can't remember that.

Q. Well, assuming that the exhibits in evidence are correct. Now, did you have a habit then of buying stuff on conditional sales contract when you had that much cash on hand? A. Yes, I did.

Q. Do you have a reason for it?

A. I imagine from before it might have been a habit.

Q. What? Pardon me?

A. It might have been just a habit.

Q. It was just a habit? A. Yes.

(Testimony of Joe Palermo.)

Q. Well, in other words, you found yourself with a lot of [556] money and you still went to the bank and borrowed it; when you needed it you went to the bank and borrowed it, I take it you borrowed the money; when you get a conditional sales contract that is borrowing money. You had conditional sales contracts during the years 1952 and 1953, didn't you?

A. Yes, I did.

Q. And, yet, you had all this cash on hand, is that correct?

A. I believe that is correct, that is right.

Q. All right. You also purchased trucks on conditional sales contracts, is that right?

A. That's right.

Q. And you paid the money down, and I think you stated you paid \$6,000.00, and paid the rest on conditional sales contract?

A. That would be right.

Q. Now, on all these conditional sales contracts you could keep track of how much money you owed, is that correct?

A. I should have.

Q. Well, you paid the bills, didn't you?

A. Yes, I did.

Q. And you kept track during that time each month if you owed \$125.00 on a payment you made the payment when you were supposed to?

A. That's right. [557]

Q. Were there any of those during the years 1952 and 1953 that you did not pay on them?

A. I tried not to let any slip on me.

(Testimony of Joe Palermo.)

Q. You kept up on your books and matters during the years 1952 and 1953, didn't you?

A. I did.

Q. All right. Now, we have had a lot of discussion about Mr. Bates' records which are Exhibits 70, 71, 72, and 73, I believe, and your income tax returns for the years and your books and records. Now, Mr. Palermo, I take it from your discussion that the Exhibits 98, 99 and 100 were the books and records that you kept at home and made your income tax from, is that correct?

A. That is correct.

Q. That is these books here?

A. That is correct.

Q. Now, where did you keep these books; at home? A. I kept them at home at all times.

Q. In your little room where you did your accounting work?

A. I kept them at home at my house at all times.

Q. Now, all right, I just want to go over how you kept these figures. Your wife testified yesterday that when a check came to your house she set it aside for you in a certain spot and you picked it up and took it to your room, is that correct? [558]

A. That is correct.

Q. And then you accounted for each check that came to your house, is that correct? A. I did.

Q. And it isn't correct, though, that you put them all in your book, is it?

A. That is all——

(Testimony of Joe Palermo.)

Q. All of your checks are in your books?

A. All of my checks are not in the books.

Q. There is ninety-nine of them that are not.

The Court: He is saying yes they are not.

Mr. Bantz: It is getting along late in the day, your Honor.

Q. All of your checks are not in the books?

A. All of my checks are not in my books.

Q. All right. Now, what happened to the checks when they didn't get in the books?

A. I would imagine that some of them were cashed.

Q. But you had the checks in your own possession, isn't that right?

A. That is correct.

Q. Is there any reason why you wouldn't put down in the—I am looking at Plaintiff's—I mean Defendant's Exhibit 99 and it says here May 23, Ackley and so forth, earnings gross, and you got a check, and you had it in your room; [559] how come you didn't put it down in here?

A. I imagine it is poor bookkeeping.

Q. All right, now, you apparently had poor bookkeeping from 1948 until 1954, is that correct?

A. That is right.

Q. Is there any reason why each year a certain amount of checks became bad bookkeeping?

A. Well, I used them checks for parts and things like that and personal items.

Q. Personal items?

A. And things like that.

(Testimony of Joe Palermo.)

Q. Personal items?

A. Yes, as far as I knew.

Q. Now, didn't you just testify a minute ago that the only things you used those checks for was just parts and not personal items, or are we now into personal items? A. I am sorry.

Q. Did you use these checks and cash for personal items? A. Yes, we did.

Q. What kind of personal items? What kind of personal items did you use them for?

A. Well, there would be—there would be the groceries and small things that amounted to five or ten or fifteen dollars that we would use around the house or even tools.

Q. Do you have any idea how much money you spent for buying [560] parts in the year 1952 to 1953? A. No, I don't.

Q. You bought them generally from two spots down at Portland, is that right? A. Yes.

Q. Now, when you would cash these checks would your wife cash them or did you cash them?

A. Sometimes either one of us cashed them and most of the time it would be her.

Q. Where did you cash these checks?

A. Those checks would be cashed at one or two places in the community that could cash checks at all, and that would be either the recreation place or the bank or the grocery store.

Q. Now, when you gave your wife a check and told her to go ahead and cash it and keep the cash,

(Testimony of Joe Palermo.)

did you mark it down in the books and records that you kept it?

A. Well, I had thought that I had.

Q. You had thought that you had?

A. Yes.

Q. Now, is there any question, Mr. Palermo, about the fact that you gave Mr. Bates the figures taken out of your books and records; you gave those to him? A. I gave them to him.

Q. And there is no question that Mr. Bates reported what [561] gross earnings you made from the figures you gave to him?

A. That is correct.

Q. And it is correct, I take it, that the income tax return was made up accordingly from the information that you gave him?

A. That's right.

Q. Now, let us get to the year 1954, which is not one of the indictment years, but this morning Mr. Brown was asked if he made out your income tax and he said that he did and that he went over it with you very carefully. Did you go over it with him very carefully?

A. I was there when he showed me every item in the book and—in the book and what he was doing.

Q. And, yet, isn't it a fact that you had \$4,-960.67 that you did not tell Mr. Brown about in the year 1954?

A. I didn't know it at that time.

Q. You know it now? A. I know it now.

Q. And, yet, you gave him all the books and

(Testimony of Joe Palermo.)

records you had for the year 1954? A. I did.

Q. And you gave him your sales and all other items that you had? A. That is correct.

Q. But you had not entered on your books, then, a number of [562] checks totaling approximately \$5,000.00, is that right? A. It could be right.

Q. Do you have any idea where the deposit slips are that you don't account for here; were they sent some place or where are they?

A. Those that are not here now do you mean?

Q. Yes, correct.

A. I wouldn't know where they are at unless they could be lost in the move.

Q. Now, when you started your bookkeeping system that you had in Exhibits 98, 99 and 100, I believe you stated that you worked at it nights and Sundays and whenever you had a chance, and wrote down the checks? A. That is correct.

Q. Now, when you got a check did you write who it was from, how much it was for, and what it was for in your book?

A. That is the way I entered it.

Q. Yes. Now, during those four years your testimony shows that there is—I think that there is 235 checks that you received during the years 1950 through 1953, and I also believe that the summary showed that there is a total of 99 checks not reported. Does that sound about right to you?

A. After hearing the evidence I believe that is correct.

Q. All right, then, that appears that a correct

(Testimony of Joe Palermo.)

statement [563] would be that out of every three checks you would not report a little less than two of them, is that correct, 99 out of 235?

A. Well, that I wouldn't know.

Q. Well, is there any way that you kept track, did you give receipts to these fellows for the checks that you did not record in your books? .

A. How was that again?

Q. Did you give receipts for the checks not recorded in your books?

A. I don't believe I did.

Q. You didn't believe that you did. Well, you just cashed the checks and didn't report it so far as your books and records were concerned. I believe you testified that you saw Mr. Bates in 1948 first. Actually, it was 1949, wasn't it; didn't he make out your 1948 return? A. That's right.

Q. And you saw him for the first time in 1949?

A. That he started making out my taxes, yes.

Q. Mr. Bates entered in your records exactly what you gave him, is that right?

A. He did. I would believe so. I never went over them so I wouldn't know exactly but I would presume that he did.

Q. Well, you have listened to the testimony and it was within a penny, isn't it there? [564]

A. Yes.

Q. Now, how did you account for, say \$60,000.00 cash in the bank or actually as much cash in the bank many times as you could make money in two

(Testimony of Joe Palermo.)

years, did it ever occur to you that you had an excess amount of cash in the bank?

A. I guess I didn't realize it.

Q. Did you ever talk to one of the Internal Revenue agents and tell him that you kept track of your profit by the size of your bank account; do you remember that conversation that you had with one of these revenue agents here that you kept track of your profit by the size of your bank account; is that a correct statement?

A. I believe the correct statement to my knowledge would have been the books with the bank account.

Q. I am asking you if you told him or one of the agents that you could always figure how much profit you were making by the size of your bank account; is that a correct statement?

A. I wouldn't know. I don't know that.

Q. There is no question, Mr. Palermo, is there, that your books and records which are Defendant's Exhibits 98, 99 and 100, do not show the true picture of your gross receipts during the years of 1949 through 1953?

A. That's right.

Q. There is no question that you left off a great number of [565] checks during those years?

A. That is right.

Q. Mr. Palermo, you received all of your income tax returns for years of 1950 through 1953 from Mr. Bates?

A. Yes, I did.

Q. And did you mail them yourself?

A. No.

(Testimony of Joe Palermo.)

Q. Who mailed them? A. Mr. Bates.

Q. But they were mailed somewhere in your area down there?

A. I would think so. Mr. Bates mailed them.

Q. And those income tax returns were made up from the information that you gave him?

A. That is correct.

Mr. Bantz: May I have 86, 87, 88 and 89, please, Mr. Taylor?

The Clerk: 86 is down there.

Mr. Bantz: All right, thank you. And can I have 101, which I believe is the income tax return for 1954?

The Clerk: 102.

Q. Mr. Palermo, handing you Plaintiff's Exhibit 102 for Identification, just examine that a moment, please. Is that your signature? A. That is.

Q. Is that your wife's signature? [566]

A. That is.

Q. And is that the income tax of yours for the year of 1954? A. It is.

Q. Was that made by Mr. Brown at your request? A. That is right.

Mr. Bantz: Your Honor, I am going to offer Plaintiff's Exhibit 102 into evidence at this time.

Mr. Moore: No objection.

The Court: It will be admitted.

(Whereupon, said income tax return was admitted into evidence as Plaintiff's Exhibit No. 102.)

(Testimony of Joe Palermo.)

Q. Mr. Palermo, in 1950, reading from Plaintiff's Exhibit 86, which is a summary of receipts for 1950, now it states here the amount of your gross receipts were \$89,221.35, and you recorded \$66,090.94? A. That's right.

Q. And you didn't record \$16,873.70?

A. I believe that would be correct.

Q. Now, for the year 1951 it shows your gross receipts, and this is non-income and unidentified income included in the regular, at \$121,079.70. You recorded \$98,178.22 and didn't record \$21,951.48, is that right?

A. I believe that would be correct. [567]

Q. And also in 1951 you received 54 checks and did not record 25 of them, is that right?

A. That is right.

Q. And for the year 1950 I believe you received 53 checks and did not record 16 of them, is that correct? A. How many?

Q. No, that is wrong. You received 62 during the year, is that correct?

A. Yes, that is right.

Q. And you did not record 25 of them?

A. That is right.

Q. Now, in the year 1952 you apparently made \$131,750.59 in gross receipts, and you recorded \$97,952.27, is that right? A. That is correct.

Q. And you did not record \$29,458.50, is that correct, \$29,458.50? A. That is correct.

Q. And it shows here that you got a total of 67 checks of income and you did not report 39 of them,

(Testimony of Joe Palermo.)

is that right? A. That is right.

Q. And there is nonincome checks or unidentified, you received 13 of them and you did not record in the book any of them, is that right?

A. That is right.

Q. Now, for the year 1953 it shows that you made \$124,068.45 [568] of gross receipts, is that correct? A. That is correct.

Q. And you reported in your books and records \$102,901.73? A. That is correct.

Q. And you did not record \$13,964.16?

A. That is correct. That is right.

Q. And you received a total of 70 checks during the year 1953, is that right?

A. That is right.

Q. And you did not record in your books and records 28? A. That is right.

Q. Is there any question in your mind that those figures are not correct? A. There is not.

Q. During the year 1948 you received a total of 27 checks, reported 7 and did not report 20, is that correct, for the year 1948?

A. That is right.

Q. And in 1949 you received a total of 42 checks and you reported 18 of them and did not report 24 of them, is that correct? A. That is correct.

Mr. Bantz: May I have 102, I believe it is. No, 101 that green one right there.

The Clerk: 103. [569]

Q. Now, handing you Plaintiff's Exhibit 103 for Identification, I believe it was stated this morn-

(Testimony of Joe Palermo.)

ing with your accountant that the figure you reported was \$107,751.78, which was on your income tax return which was just admitted in evidence?

A. That is right.

Q. And then I asked if it appeared that it is correct that there were a number of checks—1, 2, 3, 4, 5, 6, 7, 8, 20, 21—a total of 21 which amounted to \$4,960.67 which did not show on your income tax return for 1951; is that a correct statement?

A. I believe that would be correct.

Q. And those 21 checks were not recorded in your books and records and not deposited in the bank account?

A. Well, I don't know about depositing.

Q. But they weren't recorded. When you bought that stock in the Idaho mining company there did you pay for it in cash or by check?

A. By check.

Q. By check? A. Yes.

Mr. Bantz: May I have Plaintiff's Exhibit 66, Mr. Taylor?

Q. Handing you Plaintiff's Exhibit 66, Mr. Palermo, I am assuming that you have gone over this. This purports to be a net worth statement of yours for the years 1949 [570] through 1953, and your net worth in 1949 it states is 27—pardon me, your net worth is \$19,208.80, is that correct for 1949? A. Correct.

Q. And that is beginning 1949. At the end of 1949 is \$26,811.07. In 1950 it is \$57,211.31. At the end of 1951 it is \$93,933.46, is that correct?

(Testimony of Joe Palermo.)

A. That is correct, at the end of 1951.

Q. At the end of 1952 it is \$119,360.41?

A. Correct.

Q. And now the only thing that is wrong with that, there isn't the \$10,000.00 deposit at the Bank of Stevenson, and that figure should be \$129,360.00, is that correct? A. That would be correct.

Q. And the total of your net worth for 1953 is \$138,084.44, is that correct?

A. That is correct.

Q. And there is no question he made this computation to the best of his ability from this?

A. That is right.

Q. And that is a true picture of your net worth growth through the years 1949 through 1953, is that right? A. That's right.

Q. Now Mr. Palermo, you have stated that you bought a hotel at Hood River in 1954. What is the purchase price of that? [571]

A. I believe that the purchase—I believe that the purchase price of that was \$106,000.00.

Q. And how much cash did you put down?

A. The cash I don't remember because I traded the houses in on that.

Q. All of your rental houses?

A. All except one where I have my shop and the other things and so forth which I have a little house for there.

Q. Didn't you put up some \$30,000.00 in cash also?

(Testimony of Joe Palermo.)

A. I don't remember the amount. I didn't remember that.

Q. That doesn't sound familiar, \$30,000.00?

A. I would have to stop and figure that.

Q. Now, you bought that hotel and your wife stated you were the man in charge of the finances of that hotel, is that correct?

A. How was that again, please?

Q. Your wife stated that you were in charge of the hotel insofar as the finances were concerned, is that correct?

A. That's right.

Q. You made the transactions yourself, is that right?

A. I did.

Q. You contacted the seller and made a regular real estate transaction concerning this hotel?

A. I contacted the buyer or the owner.

Q. The owner? [572]

A. Yes.

Q. All right. And you handled the finances of it after you purchased it, is that correct?

A. Yes, that is correct.

Q. You put the money in the bank, did you; you handled the books and records of that hotel, did you?

A. No, I didn't.

Q. Didn't you have an accountant at Hood River that did bookkeeping for you?

A. He did.

Q. You did the purchasing and other business transactions to sell that hotel, did you?

A. No.

Q. Well, your wife stated that you were the

(Testimony of Joe Palermo.)

manager of that hotel insofar as the finances were concerned, or did you do anything?

A. Not too much.

Q. And you lost a little bit of money on it, is that right? A. I did.

Q. And I believe you bought it and you didn't know whether it lost money or made money?

A. No, I know it made money.

Q. At the time you purchased it you knew that it was making money? A. Yes. [573]

Q. Actually, Mr. Palermo, you are a pretty astute business man, aren't you?

A. After the evidence I wouldn't think so.

Q. Well, do you know of any people in the logging business that have sixty to eighty thousand dollars cash in the bank each year?

A. I haven't checked or asked anyone for that information.

Q. No. It took a lot of labor and management to get sixty or seventy thousand dollars cash, didn't it?

A. It took a lot of work.

Q. You bought the hotel with the same assumption that you logged logs, didn't you, that you were going to make money with it?

A. Well, it was my intention.

Q. And it has ended up that you did not?

A. No, I did not.

Q. And you sold it? A. Yes.

Q. How much did you sell it for?

A. It was just sold May 1st and he sold it and I don't know how much I lost on it——

(Testimony of Joe Palermo.)

The Court: That wasn't the question.

Q. How much did you sell it for, Mr. Palermo, what was the selling price?

A. The selling price was a trade for a motel valued at [574] \$25,000.00, plus the balance in cash, which I don't remember whether it was \$5,000.00 or \$5,500.00.

Q. And that was for your equity?

A. That is correct.

Q. And now you are in the motel business now, I take it? A. No, I sold that, too.

Q. You sold that? A. Yes.

Q. Did you get paid for that?

A. No, I made another trade.

Q. What do you own now out of this hotel?

A. Out of the hotel?

Q. Well, you sold it for cash, plus some motel?

A. Well, it finally got down now to where I traded it for a ranch at The Dalles, Oregon.

Q. And I take it then that you understood real estate transactions, you can buy and sell at least, is that right? A. Well, I wouldn't say that.

Q. You know the difference between assets and liabilities, too, I take it? A. I am learning.

Q. And you knew it from 1950 through 1953, didn't you?

A. I didn't know too much about it.

Q. Well, you knew that assets mean that you had some money in your pocket or you got some money coming, is that right? [575]

(Testimony of Joe Palermo.)

A. Well, I knew that it was supposed to have been that I had it.

Q. All right. You knew enough, Mr. Palermo, about bookkeeping that you had enough sense to put down here when a man paid you \$2,875 in his name and what it was for? A. I did that.

Q. You did that? A. Yes.

Q. And you knew when somebody owed you \$2,875 that you placed it on the ledger as a liability until he had paid the bill?

A. Asan expense, yes.

Q. And you knew enough to keep track of all the money you had coming to you, didn't you?

A. I believe I did.

Q. Now, another thing about your memory, you knew enough in your income tax returns to take losses that you incurred in certain years, didn't you, you could remember the losses that you incurred during the years, couldn't you?

A. I believe so.

Q. And you turned them into your income tax--the man that made out your income tax return, didn't you? A. I did.

Q. But you couldn't remember how many checks that you didn't record in your books and records?

A. No, I couldn't. [576]

Q. All right. Just reviewing a few of these checks. That is Plaintiff's Exhibit 36. Here is a check in the amount of \$127.00 made out to Joe Palermo and indorsed by you at the Recreation

(Testimony of Joe Palermo.)

Center. That is at the Recreation Center at White Salmon, is that right? A. That is correct.

Q. Now, here is a check from Plaintiff's Exhibit 76 in the amount of \$170.16, Larsen's Lunch, is that right, that has been cashed? A. Yes.

Q. And the next check, Recreation Center, in the amount of \$173.36, is that right?

A. That's right.

Q. And the next check, Larsen's Lunch——

A. That is not my check, this one here.

Q. Well, it is made payable to Joe Palermo, September 9, 1952, for \$173.36. It has got your name, Joe Palermo.

A. I am sorry, yes, you had that covered up and I couldn't see it.

Q. And here is a check cashed at the Security State Bank for Larsen's Lunch, your signature in the amount of \$255.73, is that correct?

A. That is correct.

Q. Now, here is another one from Larsen's Lunch signed by you for \$144.88. Here is another one, Larsen's Lunch, signed by you in the amount of \$263.90, and the last one is the [577] Central Food Market, \$63.73. Now, reading from Plaintiff's Exhibit 75, here is a check indorsed to Larsen's Lunch, your signature, \$159.73. Now, another one here from Plaintiff's Exhibit 35 at the Recreation Center in the sum of \$186.39. Now, Mr. Palermo, I am just picking these up, these checks that are cashed there amount to a considerable amount of money. Of those checks some of them are recorded

(Testimony of Joe Palermo.)

and some of them are not recorded. Did you have any system when you went and cashed a check that you recorded it then or does that mean when you cashed it that generally you did not record it?

A. I rightfully couldn't say. I did think that it was put in the book. I presume that it would be put in the book.

Q. You left off out of 235 checks, 99 checks you did not put in your books, that is 136 checks that you put in your book. You presumed, I take it from your testimony, that you put everything in the book, but you forgot to put in the 99. Now, that is your testimony, is that correct? A. That is correct.

Q. In the Plaintiff's Exhibit 88, which is a summary for the year 1952, I want to just show you here from the Mt. Adams Loggers Association in 1952 you received 14 checks in the amount of \$3,-686.95, is that right? A. Yes.

Q. And you recorded in your book none, is that correct; in [578] other words, 14 were not recorded?

A. That is in the book?

Q. Not recorded in the book. You deposited 12 of the 14 checks but you did not record 14 of them in your book. Is there any reason why you particularly picked on the Mt. Adams Loggers Association to not record the checks on your books and records here?

A. Well, I don't know, between the bank and the books I figured that they were recorded in one or the other.

Q. Well, you reported for your income tax just

(Testimony of Joe Palermo.)

what was in your books that you called receipts, is that right? A. That is right, yes.

Q. And when you did not record it you did not report it on your income tax?

A. That is right, I did not.

Q. And for the year 1952 you did not record any of them in your book? A. That is right.

Q. Therefore, you did not report any of them on your income tax, is that right?

A. I presume that's right.

Q. All right. Mr. Palermo, there is no question in your mind at this date that you owe the Government some money for income earned during the years 1950 through 1953, is that right? [579]

A. Yes.

Q. And have you had an opportunity to go over those figures with your accountant Mr. Brown, that we discussed here in open court?

A. That's right.

Q. And they are correct as far as you are concerned? A. Yes, they are.

Q. I am talking about recomputation of tax due on your gross receipts; you feel that is correct?

A. That is right.

Q. You feel that is correct?

A. Yes, that's right.

Mr. Bantz: Just a second, your Honor, I will try and hurry.

Q. Mr. Palermo, getting back to who controls your check books, I want to get this straight, you wrote in your books all of the stuff yourself?

(Testimony of Joe Palermo.)

A. I did.

Q. That included the receipt of the money you spent, that's right, your wife had nothing to do with it?

A. That's right.

Q. The checks came into your house and you controlled the checks when you got them?

A. I did.

Q. And you had your wife do the purchasing in Portland when you [580] bought parts?

A. That's right.

Q. Did you make out your own deposits or did your wife do that for you?

A. I sometimes made them and other times I would lay checks out for her to make them.

Q. And you kept track of the checks that you received; as much as you kept track of them, you kept track of them in Exhibits 98, 99 and 100?

A. That is correct.

Mr. Bantz: That is all I have.

Mr. Moore: Do you want me to go ahead with the redirect examination, your Honor?

The Court: Yes.

Redirect Examination

By Mr. Moore:

Q. With reference to the hotel sale, Mr. Palermo, it is true, is it not, that you got a piece of property in addition to that motel?

A. Would you repeat that again, please?

Q. On the sale of the hotel, it is true, is it not,

(Testimony of Joe Palermo.)

that you got another piece of property in addition to the motel? A. I did.

Q. Didn't you?

A. I did. I am sorry. [581]

Q. And what was that?

A. It was a piece of property in Alberta, Canada, that this party had in conjunction with the motel that he put in for the price, too, for a price of \$8,000.00 I figured that.

Q. It was put in at \$8,000.00 and the motel was \$25,000.00? A. That is correct.

Q. And, then, you received some cash?

A. Yes.

Q. And did you personally get any of the cash?

A. It all went out for bills.

Q. Do you mean on the sale itself?

A. That's right.

Q. The cost of sale? A. Yes.

Q. When you purchased the hotel if you paid any money in addition to turning in the property when you bought that hotel, how would you have paid that money over, by cash or by check?

A. By check.

Q. Since you bought the motel did you find out what happened to the former owners and operators of the hotel in their operation?

A. The former owner?

Q. Yes.

Mr. Bantz: Your Honor, I think we are getting far [582] afield what happened to the other owner.

(Testimony of Joe Palermo.)

The Court: Well, I should think so unless you mean whether they lost money on it.

Mr. Moore: That is it.

Q. Well, isn't it true that you have learned since that time, since you bought that hotel that the former operators went bankrupt operating it, is that correct?

A. I am sorry, I still don't get the question.

The Court: Well—well, all right, go ahead.

Q. Since you bought the hotel didn't you learn afterwards that the people who had operated it beforehand had gone bankrupt in its operation?

A. Oh, yes. Yes.

Q. With reference to the question that Mr. Bantz asked you on the money, your maintaining a record of the money due you, I believe that Mr. Ackley testified that he still owes you some money, is that correct?

A. That is correct.

Q. And how much does he owe you?

A. I rightfully don't remember.

Q. Is it anywhere in Exhibits 98, 99 or 100, in these exhibits?

A. I believe it is in there, yes.

Q. It is in there some place?

A. Yes, I believe it is.

Q. Do you know when he went out of [583] business?

A. I believe it was '53 when he went out of business.

Q. And you believe that somewhere in the 1953 book that there will be a record of how much he

(Testimony of Joe Palermo.)

owed you, is that correct? A. I believe so.

Q. What about the Jackknife Mill, Mr. Coleman, does he owe you some money? A. He did.

Q. Did you ever get that money?

A. I never did.

Q. Do you know how much it was?

A. Pardon?

Q. Do you know how much it amounted to?

A. It amounted to seven thousand and some dollars.

Q. Is that in your books here?

A. I believe it is.

Q. In one of these Exhibits 98, 99 or 100?

A. Yes, I believe it is.

Q. Any of the rest of these mills owe you money, the mills that are no longer operating?

A. There have been some.

Q. And if they owe you money would that be reflected in any of these three Exhibits 98, 99 and 100?

A. I believe that it would be but I am not being sure.

Q. With reference to the expenses, I don't know if this is [584] or not but your record of expenses that you used for income tax returns for things other than labor or stumpage would not be in Exhibits 98, 99 and 100, would they, and the record that you used I believe you said was——

A. Receipts.

Q. Receipts for bills that you had paid?

A. Yes, I believe that is correct.

(Testimony of Joe Palermo.)

Q. You did not use cancelled checks?

A. Yes.

Q. Since you started in business in the fall of 1947 have you attempted to conceal or hide any of the material things that you have acquired such as bank deposits, the logging equipment, your houses, the hotel, or anything else?

A. I did not, no.

Mr. Bantz: Your Honor, I am going to object, we are back on direct examination again.

The Court: I beg your pardon?

Mr. Bantz: We are back on direct examination again, and this is not proper redirect.

The Court: I think that there was some inference. I will overrule the objection.

Mr. Moore: Did you answer that question?

A. I believe I said that I did not.

Mr. Moore: That is all.

The Court: Do you have any other [585] questions?

Mr. Bantz: I have just two.

Recross-Examination

By Mr. Bantz:

Q. I take it you lost money on your real estate operations from 1954 to date, is that correct?

A. That is correct.

Q. But during the years 1950 through 1953 you never lost any money at anything, did you?

A. Better years.

Q. Better years?

A. Yes.

(Testimony of Joe Palermo.)

Q. Now, I will ask you another question: You knew how much money people owed you apparently from your books and records, is that right?

A. That is right.

Q. Well, how do you figure out what they owe you when you don't record it in your books and records?

A. That I cannot answer.

Mr. Bantz: That is all.

Mr. Moore: That is all.

The Court: That is all, Mr. Palermo.

(Witness excused.)

Mr. Moore: If we rest now, your Honor, do you want Mr. Bantz to go ahead with rebuttal?

The Court: It depends upon how much he [586] has.

Mr. Bantz: Now, may I have Exhibit 102.

The Court: What I have in mind would be the jury would like to finish the testimony without running too late tonight, and so the jury can have all the evidence in today and we will have the argument and instructions left for tomorrow.

Mr. Bantz: I hope to do it in five minutes.

Mr. Moore: All right, I will rest.

The Court: All right the defendant rests?

Mr. Moore: Yes.

Mr. Bantz: You may take the stand, Mr. Simonson.

PAUL SIMONSON

recalled as a witness by the Government, on rebuttal, was examined and testified as follows:

Direct Examination

By Mr. Bantz:

Q. Mr. Simonson, handing you Plaintiff's Exhibit 103, will you please examine that. Is that an analysis of receipts you made for 1954?

A. It is.

Q. And you checked the records concerning what is on this paper, is that right?

A. I have checked the records concerning what is on this paper, yes.

Q. What does this purport to be, just briefly?

A. Going over the 1954 income tax return, Mr. Brown supplied [587] us figures on the computation of the receipts per the return which included the deposits to the bank, the National Bank of Commerce at White Salmon, plus \$350.00 as to the value of the Dodge truck which he received from the logs, to get the receipts per the return and in addition to those we have found that there was a \$1,000.00 deposit to the Hood River Bank which was for payment for logs.

Mr. Moore: Your Honor, I believe he is testifying from something that is not in evidence yet.

The Court: Is that 103?

Mr. Bantz: Yes. All right, I will do it the long way, your Honor. It is a summary for 1954.

The Court: I don't believe 103 is in evidence yet.

Q. Mr. Simonson, did you check the records

(Testimony of Paul Simonson.)

that are in evidence to see as to the records if there were any checks or sums of money in the bank that were not recorded in his books and records for 1954? A. There are none in evidence.

Q. When did you check these?

A. I checked these during the course of the investigation. I examined cancelled checks of people who he had done business with in 1954.

Q. And what did you find during that investigation?

A. I found that there were checks which were not deposited in [588] the bank account and therefore would be additional receipts to add to the bank account, to the bank deposits as determined by Mr. Brown.

Q. Now, did you make a list or have you made a list of those checks? A. I have, sir.

Q. And is the list what I have before me?

A. That is correct.

Q. And that is for the year of 1954?

A. 1954 is correct, yes.

Q. And that is this list? A. Yes.

Mr. Bantz: I am going to offer Plaintiff's 103 into evidence, your Honor——

The Court: Did you see that, Mr. Moore?

Mr. Bantz: It is only for the purpose of showing similar acts and transactions for 1954 as in the case for 1948 and 1949 of nonreporting of checks.

Mr. Moore: We have no reason to know whether these are correct or not, your Honor.

The Court: Well, I think it is not the best evidence.

(Testimony of Paul Simonson.)

Mr. Moore: No, I don't think it is.

The Court: It is at least not the best evidence where we can have the checks here and examine them. I will sustain the objection. [589]

Mr. Bantz: Your Honor, I again there in my offer I think that maybe I should state the fact that Mr. Palermo himself stated that the figure was correct and that the checks weren't entered in his books and I think his testimony together with that of Mr. Simonson would make the exhibit admissible.

The Court: I don't think you can admit the exhibit on the admission. The admission would stand for what it is worth but I don't think it would lay a foundation for the introduction of the exhibit.

Mr. Bantz: You may examine.

Mr. Moore: No questions.

The Court: That is all, Mr. Simonson. I think I will have the jury step out just a moment.

Mr. Bantz: I am going to rest, your Honor.

The Court: Well, I just wanted to discuss something with you briefly here. It won't be long.

(Whereupon, the following proceedings occurred in the absence of the jury:)

The Court: Are you ready to rest, then, Mr. Bantz?

Mr. Bantz: I am, your Honor.

The Court: What I had in mind, it always seems to me that it is highly desirable, if we can, to have the argument all in one session of court. I don't like to have the situation of breaking into

the lunch hour and coming back and [590] start arguing afterwards. It is advantageous to one or the other of counsel. I don't think it is quite so important to have the Court's instructions at the same time but I think it would be perhaps able to button it all up before lunch, and of course whether we can finish in the forenoon session depends upon the time you wish to have for argument and the time you would begin.

Mr. Moore: My argument would depend upon his.

The Court: That is right.

Mr. Bantz: Well, your Honor, I want to say that I would like to have forty five minutes, if I may. That is going to be one and one-half hours of argument then. Could we start at nine-thirty?

The Court: We could start at nine-thirty or we could start at ten and I could give my instructions after lunch. I know in a case of this kind counsel have plenty to do to get their case on and I don't like to start too early in the morning, and it does take you time to prepare your argument, and there are so many exhibits here. What would you prefer, Mr. Moore?

Mr. Moore: Frankly, your Honor, I would be willing to go ahead and start at 9:30 and as Mr. Bantz says each side will take forty-five minutes.

The Court: What we will do is give you forty-five minutes on each side, and as Judge Webster used to say, don't [591] feel under any moral obligation to use it all. And I think we should be here ten minutes and finish and I can give you some

idea of my proposed instructions and you will have some idea of what I would instruct. The real point in issue is guilty knowledge or lack of intent——

Mr. Moore: Along that line, your Honor, would it be all right if I took three minutes this afternoon just to keep the record straight and make a motion, rather than take up the time tomorrow morning on that?

The Court: Yes, you may do that. Yes, to preserve your record you may make your motion.

Mr. Moore: Comes now the defendant at the conclusion of the presentation of all of the evidence and asks the Court to direct a verdict of acquittal as to all four counts.

This motion is based upon the ground that all of the evidence at the present time does not exclude every reasonable hypothesis other than that of guilt, and that the question of intent being the basic question to be presented in this case, that the evidence is as consistent with innocence as with guilt and that under the rule of *Elwert vs. United States*, 231 Federal 2nd 928, the court should direct a verdict of not guilty as to each of the four counts. That the question of intent is one of the basic issues of this case and there is no independent evidence other than the understatement of income for the years as proof of intent, and that therefore the [592] Government has failed to sustain its burden as a matter of law.

The Court: The motion will be denied and you can bring in the jury then.

(Whereupon, the following proceedings occurred in the presence of the jury:)

The Court: Now, ladies and gentlemen of the jury: The evidence has all been submitted and both sides have rested, and so the only thing that remains in this trial is the closing argument of counsel and the Court's instructions to the jury on the law that applies to this particular case. And so that we may finish before lunch tomorrow we are going to start a half hour earlier. You will come back at nine-thirty and hear argument and the Court will instruct you, and I hope to get through by lunch time. And please remember don't discuss this case among yourselves or with anyone else until you have retired to consider your verdict in the jury room, and don't discuss this case with any outsider. Now, when you come back tomorrow and you go and consider your verdict you will be kept together in the charge of the bailiff and if you take your meals, and while it very rarely happens you may be kept overnight. If you agree before that and notify the bailiff you will go back into court and report your verdict but if you have difficulty it is possible that you remain overnight. I mention that if you want to stick a toothbrush in your pocket [593] and bid your family goodbye and prepare for a long session. Court will adjourn until nine-thirty tomorrow morning.

July 30, 1957—9:30 A.M.

The Court: All right, proceed.

PLAINTIFF'S OPENING ARGUMENT

Mr. Bantz: Your Honor, Ladies and Gentlemen of the Jury, and Mr. Moore: At this time the plaintiff, and I represent the Government, has the opportunity to discuss its position relative to the case concerning the evidence that you heard, and I want to start out by saying that what I say is not evidence. It is merely my version of it. You have to make up your mind when you go to the jury room.

I will talk first. Mr. Moore, then, has a chance to talk and then I have the opportunity to rebut and close.

You have been here now a week, I believe, today and you have heard the evidence. All of us have a particular job during one of these trials. I represent the United States and I have to put forward the suit of the United States and prove a case. And this is a criminal trial and I must prove beyond a reasonable doubt that the defendant is guilty, and if I don't prove it through the evidence we have submitted you are to find the defendant not guilty; and if we have proved it and you so find after proper deliberation, we ask that the man is found guilty. [594]

Mr. Moore has the job of defending the defendant. Each has his own job. The Judge runs the courtroom. He makes up the rules of procedure—I mean he enforces the rules of procedure and rules on the

law, and will instruct you and I and Mr. Moore on the law that is to be followed in the case. Then, it comes your duty, and that is the duty of making a deliberation in your mind of all of the evidence that has been presented in this courtroom, and nothing else. You don't have to listen to anything else, pay any attention to anything else but the evidence that has been produced before you in this court.

The evidence has been brought forth by the plaintiff and it is a case involving what we commonly call income tax evasion, as you are well aware of now. This is really a simple case. It is not an involved one where we have all kinds of argument. In fact, I might say it really has been a pleasure to try this case where we have had as little interruption and have made as much speed.

But I want to say about income tax evasion cases, they are a secretive case. This is no crime of violence where we are charging some fellow with something of that type. You don't go around telling anybody what you are doing in the committing of income tax evasion. I have found and I think you have found that it is a crime that is within an individual, what his intent is, and that is actually the crux of the case [595] here. And what I am going to do, I am going to discuss with you what I have felt that the evidence has shown during the course of the trial as to the defendant's intent during the years of 1950 through 1953; and I want to talk about some of the other years, too, but they are not in the indictment, and I will mention that; that anything I say about the years 1948 and 1949 and 1954

that were testified to, he is not being tried for those years. I have put in certain evidence through witnesses concerning those years, and I think you will recall that I asked that it be admitted for the limited purpose of showing similar transactions and design in previous years and later years, and I think that the Court will instruct you on that, that that is the only purpose and no part of the case here.

Getting into the income tax evasion, I think you have sat here for five days and you have listened and you have found that it is not a crime that you go and broadcast out to anybody. I think you will observe that in this case.

They have five or six character witnesses who are excellent men. I have no dispute with them. I have no doubt that the character and reputation of Mr. Palermo in White Salmon is excellent. I have no dispute with it and I think that is always the way it is. It should be that way. But remember all of the questions that I asked them: Did you know that he had understated his gross receipts during the [596] years 1950 through 1953? No, they didn't know it. I grant they didn't know and they come in and testify; and I want to be fair about it, he had a good reputation down there but also the reputation is not within him and it isn't what he had done there in the past five or six years. It is what the public knows about him, what the public sees.

Now, I want to state in this particular case, and I don't think there is any question about it, that he filed his income tax return. It is admitted and we

got it in evidence and he stated it was his, and Mr. Brown stated it was his and that the figures were apparently all right. And he mailed them and sent them into Tacoma. There is no question that the testimony shows it and he admits it and the accountant does, and I think we have proved by the witnesses how much he owes and I think it is in there for the years 1950 through 1953, and there is no question about it being admitted.

There is no question but that he understated his gross receipts. He admits it. The accountant admits it. We proved it through separate evidence in the trial. There is no question but that the accountant made up the returns accounting exactly for what he submitted to them in making up the returns.

I want to recall before we go much further, evidence showing a little bit of intent. You remember Mr. Bates, the [597] accountant from White Salmon, testified he received certain things from Mr. Palermo regarding his income tax returns, which were his gross receipts for those years. They were written down. He only missed it one penny out of nearly \$400,000.00. We can't get much closer. He prepared them from the figures that Mr. Palermo turned into him. Mr. Brown prepared one in 1954, from the figures that he got from him. In 1948 and 1949 they were prepared the same way and each year there was an understatement, but there is no question but what Mr. Palermo knew what he was doing, and I am going to go over it and show you why I think so. That is my version of it, and I am

assuming that Mr. Moore will have a different version.

To begin with, we didn't have a net worth statement in this case for the year 1948 but in evidence in Plaintiff's Exhibit 66 you will find that Mr. Palermo states in there that he had a net worth in 1949 of \$19,208.00 and at the end of 1953 I think Plaintiff's Exhibit 66 will show that he had a net worth of \$148,084.44. Now, the exhibit of course shows \$138,000.00 but Mr. Brown states that there was an additional \$10,000.00 in the Stevenson State Bank that wasn't accounted for, and I believe Mr. Simonson states that also, and so it would be \$148,000.00 that he picked up in about five years.

Now, that is actually a net gain of around \$128,000.00.

You are going to have to listen to me for a few moments [598] and so if I have to have a drink of water just bear with me.

Now, I want to talk about what 1948 shows just a minute. When you go into the jury room review the income tax return for 1948. It is not in the indictment but I am going to start right at the very start that we are in here. The return shows that he lost \$6,040.00 on his income tax return for the year 1948. In 1949 it shows that he made \$1,824.00. In 1950 it shows that he made \$4,553.00. But just look at this, and I think here is where we are starting for 1948. In the three years on from 1948 to 1950 he made a total net gain of profit of about \$300.00, about \$300.00 difference. He lost \$6,000.00 and he made \$1,800.00 and \$4,500.00. He made \$300.00 in

1948, 1949 and 1950 in accordance with the returns. But let us take a little look here. But in 1948 he did not report \$7,454.75 of income. In 1949 he did not report \$10,705.97. In 1950 he did not report \$16,873.70. He shows on his income tax return he made \$300.00, in those three years, but you have got to put down that he also took in \$35,035.15 that he did not tell anybody about. It looks to me like he made more than \$300.00. He would make you believe that in the first three years he made no money.

He had to live and he had to participate in the community activities and raise a family and yet it shows he only made \$300.00 when he had \$35,000.00 to deal with and put in the bank and get along with. [599]

I will ask you this: Is it possible to know that you are not evading income tax when you account to the Government for \$300.00 and you admit on the stand when the evidence shows, that you had \$35,000.00 which you did not report?

Let us look at the years of 1951, 1952 and 1953. I want to show you what I believe is a pattern or plan in this particular case. Remember, it is my contention that income tax evasion is a secretive crime. That a man does not broadcast but we have to prove by his actions, by the evidence that is both circumstantial evidence and real evidence that we place in this trial. You are the judge of that evidence. You have to make up your mind. But I want to review what goes on for the next three years. In 1951 Mr. Palermo took in \$120,000.00. I am just going to use round figures and so I will keep it within the thou-

sands. He reported \$98,000, and that means that he did not report, then \$21,900.00.

Now, in 1952 he took in \$127,000.00. He reported \$97,000.00 and he did not report \$29,000.00 of it. In 1953 he took in \$116,000.00. He reported \$102,000.00 and he did not report \$13,900.00. And I want to show you how big this gets. During the years of 1948—I went over those figures with you—but from 1948 through 1953 Mr. Palermo had in his hands \$500,673.17 according to the evidence. He reported on his income tax returns \$401,000.00—\$401,463.88. But during the same time he did not report \$100,-409.29. [600]

Now, I want to show you a little pattern, what goes on. To me it is the crux of the case. If we cannot show that Mr. Palermo wilfully violated the law, I am out of court and you should acquit him, and if you cannot in your own good conscience find that he did it wilfully I ask that you acquit him, but I ask that you review the evidence of what is in this courtroom and then make up your mind and then come in with the proper verdict, one which we feel and I ask you, of guilty. But look here how the pattern runs. 1948—now, I might say you can review them for yourselves but I want to review them here because I feel it is my duty to do it—in 1948 he received approximately 27 checks of various amounts. He did not report 20. In 1949 he received 42 and did not report 24. In 1950 he received 53 and he did not report 16. In 1951 he received 54. He did not report 25. In 1952 he received 67 and he did not report 39. And in 1953 he received 61 and he did not report 19.

He received during those six years that I am talking about here 1948 through 1953—and again I say that between 1950 through '53 are the indictment years but I want to show the similarity through that time and the other years—he received 235 checks and he did not report 99 of them.

Now, I want to go on to 1954. Mr. Brown testified that he made out his income tax for the year 1954. They went over [601] it carefully. I think that the testimony was that they spent considerable time on it. And yet Mr. Palermo with his own accountant after he changed from Mr. Bates, who he felt hadn't properly done it, apparently, and after they had looked the matter over carefully, I asked him about the 21 checks that were not reported in 1954, totaling \$4,960.67, which he didn't even account to his own account for after he had been notified of the investigation of this case.

Now, I want to take up a minute about the investigation of this case and what I feel about this case. Mr. Palermo has co-operated with us since 1954. I am not going to dispute it. I think that the evidence shows us that he told us about it, and our own man tells us that. But the crimes were committed in 1950, 1951, 1952, and 1953. What he does now to change it has nothing to do with the crime he committed in those four years, but yet it appears that he did not change too much in the year 1954, except on a little lesser scale. I think it is important that you remember the whole period of the scheme that Mr. Palermo apparently had to evade his income tax.

One of these cases are always hard when we start out and come to the end of it where you have to make up your mind as to what the facts show, the evidence, and we don't ask that you do another thing but review the evidence and make up your mind as to the intent of this defendant from the evidence that [602] has been adduced in this trial. I think that you can start back with 1948, through 1954, that we have talked about. Each year sit down with what happened, because here was the testimony, as I recall it. Mrs. Palermo was asked who took care of the books, what happened. She puts all the checks in one place and he came in and got them and went to his room and took care of them. What was Mr. Palermo's testimony? He was the sole responsible man for the checks. Apparently 235 of them came in and 99 of them did not get into the records, and yet he takes the stand and wants you to believe that he went to his room each night for the six years that he was working on his books, wrote down all checks that he had received, and yet 99 of them, of the 235 didn't get in there. And he says that he had no intention of evading anything. Mr. Palermo had absolute control over every check apparently that came into his household and yet the checks were cashed by his wife and he testified he told her to cash them and if he cashed them he said he cashed them for bills and at the same time he wrote them down in the book. Well, did he write them down in the book? 99 out of 235 didn't get into the book and if they didn't get into the

book he must have had some reason not to put them in the book and he didn't. Sit in there and look at the evidence yourselves. It is summarized for you piecemeal. Look at the exhibits. There is no other conclusion but that Mr. Palermo [603] deliberately with wilful intent did not place on his gross receipts 99 of the checks that he received in the period of six years of which we are specifically charging him for four years.

I can see no other conclusion but that from the evidence that has been adduced in this trial. But that that is a conclusion which you have to come to when you give proper deliberation to all of the evidence in this trial. Thank you for the time.

Mr. Moore: If the Court please.

The Court: Mr. Moore.

DEFENDANT'S ARGUMENT

Mr. Moore: Ladies and Gentlemen of the Jury, Mr. Bantz: I don't intend to come before you and wave the flag or attempt to get emotional or anything else in my argument. As Mr. Bantz said, he has told us what he thinks this case shows, and it is my turn to tell you what I think that the case shows. And I think if you approach the evidence logically that the only conclusion that you can come to is the conclusion that I have come to and that is that Mr. Palermo is innocent.

However, I don't ask you to go that far. All I ask you to do is find a reasonable doubt, as the judge will define that to you. However, Mr. Bantz said in this

case that the only question is: Did Mr. Palermo evade his taxes and try to. As he told you, we admit that he owes more money [604] than he is indicted for, but it isn't a crime to owe more money than you are indicted for. The crime is attempting to evade taxes and have criminal intent to do so when you make that attempt. If you don't have that, you are not guilty.

In this particular case how are you going to determine whether or not Mr. Palermo is guilty or innocent or whether, to put it down to simple words, did he have criminal intent or not? You can't do it the easy way by saying that Mr. Palermo got on the stand and denied that he had any intent and so I will either think he is telling the truth or I will think he is lying, and I will make my decision on that fact. However, you can't do that, even though presently inclined in Mr. Palermo's favor or presently inclined in the Government's favor, you should consider everything here, and that is as I said, consider it logically.

First of all, what does the Government contend is the evidence proving intent? Mr. Bantz has told you that you can find the intent merely from the understatement of income for the years in question, plus the understatement for 1948, 1949, and 1954. And I submit to you that that cannot be used to determine intent; and, secondly, that standing alone, it is not sufficient to prove intent. It overlooks, for one thing, the basic fact that people make mistakes. The Government's contention is that you can't make a mistake more than once because if you do then

you must not be making a mistake. You [605] must have presumed to intend what you did.

You cannot presume in a case such as this that the under-reporting of income constitutes the crime. The doing of the crime does not present or bring about proof of intent. There has to be something else to prove intent. If you follow the Government's contention you would end up with the fact that the people although they were making mistakes over the years, that it would mean that people were not making mistakes, and that is not human, and that is not the way people are.

Secondly, it is Mr. Bantz' contention that there is a consistent pattern of not reporting. Now, I would ask you to look at Exhibits 86 through 89 to see if there is anything consistent there. There is no consistent omission of a single source of income. There is no consistent omission of certain types of checks. You look at all the years involved. There is nothing consistent about it at all, except that there is money missing, and there is, but it is not a consistent pattern. In other words, they are not all checks under \$500.00 that are not reported and they aren't all cash items because he wasn't doing anything with cash. There are big checks. There are small checks. There are checks from McCormick Lumber Company, and Ackley. There are checks from other companies. Sometimes there are checks from one source of income and sometimes in here there was one or two checks [606] entered from no source of income on that book. And so I say that there is no consist-

ent pattern of under-reporting and there is no plan that we can say that was carried into effect.

Again, Mr. Bantz says, "Well, he didn't tell the truth in 1954 because he didn't advise his accountant of all of the checks." And I think if you will review the evidence, the testimony was that Mr. Brown was going over things carefully with Mr. Palermo but that when he attempted to recap his gross earnings he did not go to Mr. Palermo's bank accounts, and get the deposits, and so the only conclusion to come to on the evidence was that whatever amount was missing was some of this money that wasn't deposited. And I submit to you, Ladies and Gentlemen of the jury, does it sound reasonable that a man discussing with an accountant in 1955 when he is making up his 1954 income tax, knowing that he is being investigated for prior years, having had meetings with Mr. Simonson and Mr. Blankenship, and having hired an accountant and having hired an attorney, that he is then going to wilfully try to hide something from the Internal Revenue Service? That is not logical.

Again, the Government contends that you can find intent from the amount of the omission. That is not correct either because the amount of omission is not material in a tax evasion case. It is whether or not income was omitted or not [607] omitted with the wilful criminal intent to evade taxes. You can be just as guilty in omitting one dollar as you can for omitting \$10,000.00, if the intent is there.

And, again, the Government says, "Well, look at the number of checks that are omitted." Well, you

can do a lot of things with figures. You can take the checks and take the number of checks and see how much income was omitted, but it isn't income that they are giving you. It is checks that are omitted. Look at the exhibits and see how much income was omitted. Under the Government's contention, if I earned \$10,000.00 per year and I got nine checks for one dollar each and if the rest of it were all in one check and in reporting it, and I inadvertently omitted the nine checks, then I would have been omitting approximately 99 per cent of my income, under the Government's approach to this. And that isn't proper.

I think if you will check the evidence you will find that over the years in the indictment—I don't know what figures Mr. Bantz has—but our figures totaled come to \$447,371.00 which Mr. Palermo earned during that period of time, '50 through '53, and he reported \$365,000.00, which means unreported \$82,000.00, or approximately eighteen per cent.

Now, continuing with the Government's contention, there was some claim that there was a concealment of the sources of income because names didn't appear in the books. Now, when [608] they talk about the books they are talking about these two or three books which we put in evidence but those don't constitute all of the books of a taxpayer. Anything that a taxpayer has in his possession constitute his books. Mr. Palermo had those books and he had practically all of his bank statements in his custody, in his possession, showing amounts that he

had deposited in his bank accounts and the checks that he had written, and in addition he had Exhibit 108, I believe it is, which are the deposit slips. Now, those deposit slips are as much a part of Mr. Palermo's records as those books. So, if you look at Exhibit 108 you will find that there could be no concealment of sources of income because every one of his sources of income appear in those exhibits. Not all the checks are in there because he didn't deposit all of his checks but his sources of income are in those, and he had them and he retained them. And in addition to that, Mr. Palermo testified that the first time he met Don Blankenship in the fall of 1954 he was asked as to his sources of income and he advised him of those sources of income, and Mr. Blankenship did not oppose that testimony.

Also, there is some testimony concerning the bank balances at the ends of the years, and Mr. Bantz says that that is proof right there: His bank balance goes up and his net worth goes up, and he should know. Well, take a look at the bank balances. The bank balances fluctuate all the time. [609] The end of the year is merely a bookkeeping point and as was pointed out to you yesterday it goes up to \$80,000.00 and goes down to \$30,000.00 or \$50,000.00. There is nothing consistent about the bank balances. I don't believe you can say that the increase in the bank balance proves intent to evade taxes.

Now, what has Mr. Palermo done affirmatively, at the moment, not looking from the standpoint of what the Government has produced or proved, but what has Mr. Palermo done or said which tends to

deny the existence of intent? Well, first of all, as I mentioned before, he has categorically denied any intent while on the stand. In order to find Mr. Palermo guilty of tax evasion you have to say that he committed perjury up here on the stand. And secondly, although Mr. Bantz says this hasn't anything to do with it, he has fully and completely co-operated with the Internal Revenue Service. They have been given all the information they asked as to sources of income, assets. They were given net worth statements and profit and loss statements and he has given them full opportunity to examine every record that he had in his possession. And along that line, as testified yesterday, Mr. Blankenship came to see him in the fall of 1954 and asked him, "How much money did you have in the bank?" And he said, "here at White Salmon I don't know." And he said, "I will go up and get the bank statements and I will bring them down." And they [610] compared nothing right then. And he told them that he had an account down at Stevenson and he didn't know how much he had in it but he could go down and find out. Mr. Palermo said that he thought that his gross was correct on his income tax returns and his books and the net was correct and that his taxes were correct. And Mr. Bates who made out the returns and makes out 150 returns per year said in his opinion those figures were reasonable. Now, if Mr. Bates who made out 150 tax returns a year and makes out returns for other loggers would figure that those gross and net and tax figures were reasonable, is it

logical that Mr. Palermo not think that they are reasonable?

Again, what is the difference between this case and a tax evasion case, a logical tax evasion case? First of all, if Mr. Palermo were going to evade taxes and was going to attempt to get away with some money from the United States of America, wouldn't he follow the normal procedure of having bank accounts in widely separated areas or under assumed names, or cash stuffed away in safety deposit boxes or stuff like that? We don't have any of that here. What did he do? He put practically all of his money in a small-town bank at White Salmon in his checking account. Is it logical that a man seeking to evade taxes is going to put all that money in a checking account in a small-town bank? And he didn't make any effort to conceal the existence of that bank account? There [611] is a financial statement in evidence here given in 1953 in which he put down that he had \$50,000.00 in his bank account, his checking account. Now, is Mr. Palermo, seeking to evade taxes according to Mr. Bantz from 1950 to 1953, going to go across the street or wherever it is in White Salmon to one of the men he knows—and he knows an awful lot of other people in that small town—is he going to go over there and put down that he has \$50,000.00 in his checking account when he is trying to keep that information from becoming too public because if it does become too public he might get in trouble with the tax authorities? That is not logical.

Nor did Mr. Palermo keep separate accounts, one

for his personal and one for his business. He just dumped everything in there.

Again, with reference to the accounts in the banks during the period of the indictment, out of \$447,371.00 that he earned, he put \$437,000 of it in his bank account. And the Government says that that is the way a tax evader would act. I submit to you that it is not.

Again, he received all of his money by check. He didn't have anybody paying in cash. He got everything by check and his sources of income were few.

Now, a man might conceivably think that he could get away with some money from the United States Government if he did a big cash business, by putting \$5.00 cash in the tax and [612] saying that that is Uncle Sam's and put \$5.00 in his pocket and say that is mine. But look at the evidence. In 1950 he had 2, 4, 6, 7 sources of income all by check. In 1951 five sources of income all by check. In 1952, twelve sources of income by check; and in 1953, five sources of income all by check. Not only all by check but all from mills in the immediate vicinity where he lived, and large checks.

Now, does it appear logical to you that Mr. Palermo, having that few sources of income who are all paying him by check and he signs his name on a check and he puts it in the bank account and/or cashes it and it goes right back to the man who wrote the check to him, some of these large saw-mills, does it sound logical that he thinks that he can do that and cover up and conceal those sources of income, and not report income and hope to get

away with it, with that few sources? As I say, it is not logical.

Again, he did practically all of his own business by check himself. He wrote checks out of his bank account. He didn't receive a check and take it and cash it except in a few instances for the purchase of either some groceries or some items down in Vancouver, Washington, and Portland, Oregon, where people wouldn't accept checks from him because he was a logger. The vast majority—practically all of everything that he purchased or paid for came right out of his checking account at White Salmon. If he bought timber he paid his [613] check. If he bought trucks or bought a loader or if he bought a car, anything he did, he did it by check. He kept a record of it and the checks are in evidence. Is that the actions of a man attempting to conceal his income?

Nor did he take checks out and buy items from people by indorsing the checks over to them and buying something for himself or some asset that he could hang onto. He did none of the things that logic tells you he would do if he sought to evade taxes. As a matter of fact, for everything that he spent money—practically everything that he spent money for went out by check. Again, did he hide any of his assets? In other words, did he buy something that wasn't readily discoverable? Because that, I submit to you, is the logical approach of a tax evader.

What did he buy? He bought the house where he lived and he bought some rental houses over at

White Salmon, equipment for his logging company. He bought some stock in a gold mine. I don't know whether it has anything in it but in any event he bought it from people at White Salmon. It is a corporation and the president lives at White Salmon. There was nothing that he took and purchased either under an assumed name or anything else and hid. He unfortunately bought a hotel right across the river at Hood River. And so, again, he didn't follow the logical approach of purchasing assets and hiding them. [614]

Again, what would a man seeking to evade taxes do with reference to his records? If he thought he was going to get away with it, and anybody—I assume that anybody that tries to violate the law and thinks he is going to get away with it when he starts it, wouldn't he destroy records and wouldn't he do away with records? He hasn't. They are right here, his checks, his books, deposit slips, and cancelled checks and statements. Again, with reference to Mr. Palermo, you saw him on the stand yesterday afternoon. You have received some impression of what kind of a man he is. We had character witnesses and I think that those character witnesses testified completely honestly. They have all known him for a long time in a small town. I don't know how many of you have ever lived in a small town but I imagine that is one place where a reputation is important, because I live in a small town myself and you get talked about. It might be good and it might be bad but everybody knows everybody else's business. And his reputation has been and is all right, according

to the testimony, for honesty and truthfulness and has a law-abiding character, anywhere from favorable to excellent; and in addition to that, two of the witnesses said that that was also their personal opinion. Jolly Sprague testified to that effect and he has known Mr. Palermo for a long time. And these witnesses were whom? Mr. Bates, the man who made out his income tax returns, so testified. Of course, his [615] father-in-law testified that way. I don't know whether his mother-in-law would have testified that way but his father-in-law believes that his reputation is a good one. Marion Babb, who is the manager of the bank, Jolly Sprague, as I said before, Mr. Crowe, the Klickitat County Commissioner, Mr. McCoy, the insurance man, and Mr. Reed, his attorney.

How does a man get a reputation? He gets a good reputation by being a good man. And does it again sound logical that a man who is now forty-eight years old, and in 1950 would have been forty-one years old, that that man will live until he is forty-one years old in 1950, and forty-eight in 1957, and establish a reputation for honesty and for truthfulness and for being a law-abiding citizen, and then here he is a tax evader? It isn't likely. Somewhere along the line a man will do something if he is criminally inclined that will show up, and in order to find Mr. Palermo guilty you have to say that he is criminally inclined.

Now, in addition to that, Mr. Bantz says that these people testified that they didn't know that he

had under-reported so much money. Well, that is not exactly what the witnesses testified to. One of them testified that he did not know that during the years 1950 to 1953, but it is a cinch, ladies and gentlemen, that those people have known ever since this man was indicted, and the witnesses certainly know it from having been up here in court. [616]

What do we have as a man here? We have Mr. Palermo who is, and has been all of his life, a hard-working logger. There is no evidence at any time with this money that he was making that he was living high and spending money on himself in large quantities, gambling and drinking and anything else. We admit that the money was piling up there but what was Mr. Palermo doing? Was he trying to hide it or do anything else? No, he was just out working in the woods.

The Government contends that Mr. Palermo is an astute businessman. Well, I ask you, would a businessman try to keep his own records where without any prior experience or business on his own, where he had been nothing but a truck driver in 1930 and a sawmill worker from 1930 until 1947, he had been a truck driver and working in the sawmill and he never had any experience on books or anything else, would an astute businessman try to keep his own books on a business grossing over \$100,000.00 per year? Would an astute businessman buy a hotel without asking anyone for advice where that hotel, as he subsequently learned, that the operators had gone into bankruptcy? He got no information at all about whether it was a going busi-

ness or not, and he bought a hotel thinking he could operate it, and he never had even run a hotel. And how did he end up? He lost \$12,000.00 per year cold cash while he had it. \$17,000.00 per year including depreciation. Is that an astute businessman or is that a [617] man who is trying to evade taxes? Would an astute businessman buy cars on conditional sales contract with \$50,000.00 in his bank account? Now, why? It isn't logical. If he has got \$50,000.00 in his checking account, why didn't he pay cash? What did he do? He had to pay finance charges from GMAC and payments. And certainly he wasn't hiding anything on his Cadillac; and certainly it isn't a crime to own a Cadillac, ladies and gentlemen. It never has been and never will be. But he bought a Cadillac for \$1,577.00 and a trade-in. Now, if he could write out a check for \$1,577.00, couldn't he sit down and write one for the balance which was a little over \$1,000.00? He couldn't hope to possibly hide the fact that he had anything in the bank, that he had money in the bank, by not writing an amount for \$1,000.00 for the additional payment. And it was just like he said, that he was a truck driver and he had earned nothing until 1947 and then he got to earning that money, and he had thought nothing about buying cars on conditional sales contracts. He thought nothing about it and just went ahead and bought on conditional sales contract.

And so I say what we have here is not a case of a man wilfully trying to evade taxes. We have a man who worked for somebody else for seventeen

years and driving a truck, and he got into the logging business and he started making more money in one year than he probably made in the [618] seventeen years that he was driving truck. Now, if he had been a logger on his own for twenty years making this kind of money and then all of a sudden this money didn't all show up in his books, then I would agree with Mr. Bantz. I would say yes. There would be a case of tax evasion because there is a man that has had experience and knows how much he made and knows how much he can expect. But we don't have anything like that. All we have is a working man who started making money and didn't know what to do with it. He had too much of it. And I would say that it is probably as true in the case of Mr. Palermo as it would be you or me if we were given the responsibility of taking care of \$100,00.00 per year just like that after having nothing but \$4,500.00 per year as wages where your taxes had been withheld from you and you were given to suddenly take care of it, and you are out working in the woods and seeing that those logs are cut down and sold I would submit without any past experience. The omissions as they occurred here are logical and are logical from the standpoint of innocence and not from the standpoint of tax evasion.

As I said to you, I submit that Mr. Palermo is innocent, and as I also told you I would like to have you believe that completely, too. But I am not asking that. I am asking only that you find a reasonable doubt, and when you retire to the jury room I request that you look at all of the [619] evidence, as

I have reviewed it here for you, and I think you will have to come to the conclusion that there is a reasonable doubt. Thank you.

The Court: The court will take a ten minute recess.

(Whereupon, after the morning recess the following proceedings occurred:)

PLAINTIFF'S CLOSING ARGUMENT

Mr. Bantz: Your Honor, Ladies and Gentlemen of the Jury, Mr. Moore and Mr. Velikanje: I have again a few minutes to discuss this and rebut any part of the discussion I desire by Mr. Moore, which I thought was very good. But I want to start out by saying: He apparently relies a lot on logic. I have never understood any criminal case and I don't think you can understand any criminal case when it comes to logic. If they were logical we would never have a criminal case. It is the type of thing that you can never put your finger on that makes someone do something. If they were logical about it they would say that they would do it A, B, C, D, and they would do it that way, but in criminal matters in considering a criminal case logicalness has never much to do with it. I have never felt that in any criminal case where you have to show intent in their actions that logic enters into it. I also want to say that I don't have to say to the jury and the court that the man is criminally inclined as a defendant. That is going a little bit further [620] than I want to go in one of these cases. We must

prove our case beyond a reasonable doubt and the Court will instruct you that you must find beyond a reasonable doubt, but I am not saying that we must—in fact, I am denying that we must prove that he was criminally inclined, but we must prove that he did those acts and did them beyond a reasonable doubt, because criminally inclined is something that each of you would have your own version of what that meant. We have to show the intent and I think we have shown it by a scheme and his acts.

Mr. Moore says because he made a mistake that doesn't make it a crime. And he says he is not experienced in business. How long do you have to go along to be experienced? Here is a man who for the seven years we have talked about certainly was experienced by the end and by the end of 1953 was certainly experienced. I am not saying that Mr. Palermo made one mistake and I am not saying that he made two mistakes. I am just saying that he made 99 out of 235, and some time along the way we have got to get to the point where it steps beyond being a simple mistake.

Now, by a reasonable doubt, if there is a reasonable doubt, he is not guilty if there is no intentional and wilful violation of the law, and there must be an intentional violation of the law. Now, I ask you: How many years do we have to go along to show what it is. For the seven years [621] we showed it, 1948 to 1953 and part of 1954, we showed the same pattern. Sure. Maybe he could make a mistake one

year. I wouldn't deny it myself and I think that the Judge would never let us get to the jury if it is one year under the circumstances; but we are talking about four indictment years and two years ahead of time and one year afterwards that the defendant did exactly as he desired. He put in his books and records exactly what he wanted to put in there and report on his income tax return.

How simple can it be? He has a book and you can have it in the evidence and it says "Receipts." He knew who his customers were there and he listed those that he wanted, and when he got tired he did not list anything. And that book is in evidence, and that book and record is exactly what came out in his income tax through the intermediary of an accountant or individual who made up his income tax. And then he says, "I am not responsible for the other 99."

Mr. Moore says that the amount of money has nothing to do with it. The amount of money is one of the circumstances you can take into consideration in this trial. And the evidence here of the amount percentage-wise, sure, when there is fourteen per cent when you get to dealing with \$400,000.00, it isn't a large amount of money, but certainly as he went along those years, I say that it is a consistent pattern, it is consistent with a pattern and scheme in this case right [622] down to the last degree.

Now, apparently he wants to feel that we should put some blame on Mr. Brown for 1954 when they were \$4,960.67 off. It appeared to me that the rec-

ords that Mr. Brown put in, which were Exhibits 66 and 67, and the others Mr. Brown made up, he made an absolute disclosure to Mr. Brown—Mr. Palermo did—of what he wanted to. Mr. Brown went to the bank and he looked everything up and when he didn't come up with \$4,960.67, it is because Mr. Palermo didn't record it in his books. There would be no money in the books if he didn't put it in his books and he had been paid that money and he didn't have it in his books. He said it is a mistake. It is a mistake of over \$100,000.00 for those years.

Now, Mr. Moore says we have some discrepancies. He says it is \$400,000.00, and I am using \$500,000.00. I am using the figures of 1948 and 1949 because it showed a pattern, the amount. He is not being charged for those years. But we must prove that he evaded income tax by a substantial amount. We have charged him with a substantial amount and he evaded taxes in a substantial amount, and certainly we have proved a substantial amount.

Now, he told you about his being a truck driver and he didn't know what a dollar was like. Do you recall what he had in 1953? The lowest amount he had in the bank was \$58,000.00 and the highest was \$98,000.00. It varied but it [623] didn't vary too much; it didn't vary where he had \$200.00 and \$500,000.00. He always had a considerable sum in the bank. He knew he had a considerable sum and he was dealing in large figures, and yet he didn't report the large figures. It is all a part of the case and the over-all picture. I don't want you to under-

stand that I am saying that because he had \$50,000.00 in the bank he is guilty of anything, and if he is guilty of anything it is because he had \$50,000.00 in the bank. That doesn't mean that they checked him because he had that much money in the bank because if they checked everybody with \$50,000.00 the Internal Revenue couldn't get around the country. But if he had \$50,000.00 didn't that poor logger know it? Yes, certainly he had cash in the bank and that certainly means one thing to you as it does to me, that he knew that he was making a large amount of money along the way.

Mr. Moore says he suddenly started making money and he couldn't account for it. All I could say is that in 1948 and 1949 he said he didn't make any money. He kept track of that so he could take it off of his tax return in 1948 and he made \$1,800.00 in 1949 and he kept track of that. And then he had an income in 1950 where it became substantial, but he still had the first two years of practice of withholding checks each year right up to the indictment years, and he certainly had enough practice of withholding so that by the [624] time 1953 came around there was just enough checks on his books and records.

I admit that he co-operated with us. From the time we started investigating here we had looked at his books and records. We don't ask him to turn everything over. He knew that there was something wrong. He co-operated. He co-operated after we found out he had evaded his income tax. Then he found out that he had better try and clean his skirts.

Now, another thing, he says he hasn't attempted to hide anything because he is dealing in checks. I am not claiming he is dealing in pinballs or anything else except checks. These checks. And that is the only thing he could deal with. He has dealt with twelve or fifteen people. They are the people that deal in checks and he couldn't get any money any other way. If he went down and said, "Give me \$6,000.00 in cash," they would faint. He has to deal in checks. Now, there is no crime that he cashed the checks and kept the money in cash. I do that myself and you do that yourself.

What we ask you is to take a look at the checks in evidence. See where they are cashed and see the number of checks that are cashed and check them to compare with the number of checks that aren't reported. They are not large checks, \$240.00 and checks like that. It isn't in itself a guilty thing to do that. It is just one thing, and I am [625] talking about the amount of money and how he did it and how he handled his books and records.

Now, he says that he apparently is not a businessman, he is not an astute businessman. How can we hold him responsible for his actions when he is not an astute business man? He is a better businessman than I am. He is a better businessman. When he started out in 1947 he had a net worth of \$4,800.00 and admittedly takes that money and has the amount of money that we find by the evidence. He buys a hotel and he lost \$12,000.00, you remember, and he had it for the purpose of making money. He says he sold the hotel and got a motel and a piece of

property and some cash. He is a pretty good businessman and he knows the value of a dollar.

He knows how to keep his books and when he wanted to put a check down he put it down and the next time it did not get in his books and the next time he would not account for it in his bank account, and he wants us to believe that he simply forgot it, when he did it in 99 out of 235. To me it is beyond the scope of a mistake. Each year it is the same pattern.

Another thing, Mr. Moore says if you are going to find him guilty you have got to find him guilty of perjury. I am not charging him with perjury. I have not had a defendant that gets up on the stand and says, "I did it," and admit the whole [626] thing.

Naturally he is supposed to deny it and that is why he is standing trial, and he is not being tried for perjury if you can find him guilty. If he is going to admit it, he would have admitted it a long time ago and not admit it at the trial.

Now, another thing, he says that Mr. Bates looked at his returns and found them reasonable, and says there was reasonableness about the returns because it looked like his gross and net profit was about the right percentage. You know that the only fellow that knew whether it was reasonable or not was Palermo himself. Each year, say he takes in \$6,000.00 income and he would have another \$10,000.00 in his hind pocket, he is the only one that knew about it because he didn't tell anybody else about it. If he had told anybody else about it, we wouldn't be

here today, because each and every one of the people that made out his income tax reported everything that he gave to them.

There is no question about expenses. He reported them all the time. We are not taking a dime away from him as far as that is concerned. All we ask is that he report the money he made, and we want him to pay tax on that other \$20,000.00 out of the \$100,000.00 that he put in his hind pocket.

We are alleging here that he wilfully and with intent to do it, concealed it and evaded his income tax. and if we [627] haven't proved it you should find the man not guilty, that is if we haven't proved that he wilfully and knowingly had the intent to evade his income tax you should find him not guilty, but if we have proved it you should find him guilty, and you have that duty to make your decision from the evidence. It is a tough job. It is a tough job for all of you. Mine isn't a tough job. I get paid every month. But you have the duty of arriving at a verdict in this case and stand up to the courage of your convictions. And in this case I say we have proved that the man is guilty beyond a reasonable doubt because that is the duty I have to prove it as prosecutor for the United States of America.

Again, I want to just hinge a moment on the matter of reputation. Undoubtedly, his reputation is good. He says that these men have known about what he has done that came out in the trial. That wasn't my idea of the testimony at all. I don't think I went into it at all, and I don't think anyone else knew about it at the time that they talked to

the other people. Do you mean to tell me that they come up here when they learn in the indictment—the indictment says he did it wilfully and intentionally—do you want them to believe the indictment, that isn't the intention that they believe the indictment, but if they believe the indictment that he stole the money for four years, then that is incorrect to come up here and say that the man has a good reputation [628] when he stole money for four years. How could they know his reputation when they didn't know what he had done there and admittedly so in this court.

Now, they brought out that he had a Cadillac. I owned a Cadillac myself and I didn't pay quite as much money for it myself, and I don't want you to feel there is anything wrong when it is put in the evidence that he bought that on conditional sales contract. But you look at the income tax where he puts every dime down of expenses and he pays his income tax on the money that he actually made during the year. There isn't anything wrong there at all. It is a pretty good business method to do it that way, when you pay sixty per cent of the money that is net, like he was making \$40,000.00 that year, the expenses come right off of the top and he can have his money in there. There is nothing wrong in that and it is not the way of a bad business man. This is done all the time. And people go out and borrow money when they have money when they need it for some purpose and I think that goes to show he was a good business man.

Now, I want to just take a minute here and tell

you why it appears to me that there had to be a scheme and pattern that he had to follow. He had to enter in his books or keep track in his books of one check for every five days—if you will just sit down in the jury room with a pencil and paper when you get there—it was one check for every five [629] days or maybe a little less than that. One check every five days during those days and he could have kept track of it if he wanted to. And is that a complicated set of books? Every fifth day just put in your book that you got a check from Joe Blow. That was all we wanted to know here. Nothing else. If he had just entered the checks in his book as he thought he was doing we would be out of here. Just one check every fifth day. And his wife said he spent four nights a week checking his books over. His wife said he spent a great deal of time on it. And he wants us to believe that he inadvertently left out 99 checks out of 235 over a period of four years.

Now, I just want to say that during the indictment years Mr. Palermo received an average of thirty-seven and a half checks, some years more. They are in the summaries. It is an average of thirty-seven and a half checks, and he averaged sixteen and a half that he didn't account for. And so make it thirty-eight and seventeen for round figures. He received 38 and didn't account for 17 of them. That is a little bit over forty per cent. Now, I am not talking about dollar values that he didn't put them in the bank, but if you sit down and look at the figures percentage-wise, it certainly follows a pat-

tern in my estimation of what he intended to do right from the start from 1948 and 1949 through the indictment years. [630]

Now, in closing, I want to say that you have a tough job. You are going to get the instructions now from the Court on the law, and I ask you to pay close attention. They are complicated for the lawyers to listen to and get the full meaning out of them, and it is a tough job for you to get the whole meaning of them. The Court will give you the law and you will go to the jury room and take a verdict sheet in there, and after you have had due deliberation you have two choices. You can either find the man guilty or not guilty. There are four separate counts. Each count is a separate crime. I believe you will be instructed as to that. In other words, the Year 1950 is a separate crime and the Years 1951, 2 and 3 are each separate crimes. I ask that you take care in going over each year and consider them. You may use, as I understand what the Court will tell you, you may use the years 1948 and 1949 and another year 1954 to show what his pattern was, and not as to guilt as in the years 1950 through 1953, but how he did it in other years.

I want to tell you that it has been a pleasure to have a case that goes in as easily as this. And now you come to the toughest part of all of this, and that is to make up your mind. I ask that you be fair with the defendant. The matter of him being innocent goes right with him until you find that he is guilty, if you do so. But I also ask that you be

fair to the United States, which is the plaintiff, and [631] if you feel that he is guilty, that you have the courage of your convictions to bring in a verdict of guilty, and you must bring back a unanimous decision of guilty. A unanimous decision is required, that is the decision of each and every one of you. And I want to thank you for your close attention while I have been talking to you here during the trial for the past five or six days. Thank you, Your Honor.

INSTRUCTIONS OF THE COURT

The Court: Now, Members of the Jury: We are at last reaching the final stages of this lawsuit. It is my duty to instruct you on the rules of law that you should follow and some that will help in finding out what are the basic issues and area of disagreement here, and then the case will be submitted to you for your decision.

Now, I wish it were possible for me to talk to you as I am now in every day simple English and tell you the law and give you your guiding instructions in that way, but unfortunately it isn't possible for me to do so. I have the duty of accurately and fully defining for you and stating to you the elements of this offense, the degree of proof that is required and define such words that must be accurately defined or I will be in trouble with the higher court sooner or later; and while I give part of my instructions orally and off of the cuff as I am now, the more difficult ones I will write out

and [632] read to you for the reason that I wish to have them complete and accurate and state the rules of law in the way that I intend to have them stated.

Now, the burden of a juror is the difficulty of his task which is greater in Federal court than it is in state court in this matter of receiving and understanding and attempting to follow the Judge's instructions. In the state court the instructions are typed out and a copy of the typed instructions is given to the jury to take to the jury room, and then you can sit there and if there is any doubt about it you can turn to them and read them over. That isn't done in Federal court, and the instructions may be wholly oral or partly oral as they are now, or they may be partly written, but they are not all written out in typed form so that you can have them for reference, and you must as best you can, rely on your memory in determining what the instructions were, and so by remembering what the case is you can apply the instructions to the facts.

Now, a Judge in the Federal court has the power if he chooses to even comment on the evidence, and I have to do it to some extent by trying to point out to you what is in dispute, and what the meat of the issues is; and it is that part of my instructions where I comment in any way upon the evidence and testimony, you are not bound by that. Those instructions you may consider them but you are not bound by [633] them because after all as I told you at the outset of the trial, the jury is solely responsible for finding the facts and that is your sole duty

and responsibility, and nobody can relieve you of it, and it is a part of the jury system. I am not going to tell you what witnesses to believe and what weight to give to the testimony and the facts. I am simply going to point out to you what the basic issues are and then give you the rules of law and leave it to you to find the ultimate fact in issue whether the defendant is guilty or not guilty. I hope before I go ahead with the formal part of my instructions that you will not be confused by these terms that are more familiar to the lawyers and judges who necessarily are more familiar with them.

I want you to bear in mind all the time during the instructions that when I say Plaintiff United States Government, that is the Government, and the defendant is Joe Palermo, of course, or the accused in the case.

Now, the issues of fact which you are called upon to decide as jurors in this case are really essentially simple and narrow. This defendant is charged with knowingly and wilfully attempting to evade part of his income tax by making false and fraudulent income tax returns for each of the calendar years 1950, 1951, 1952, and 1953, covered respectively by Counts I, II, III, and IV of the indictment. It is not disputed—indeed, it is conceded—that the defendant's [634] income tax returns for those years were incorrect in that they understated the amount of his gross income at least in the amounts set forth in the counts of the indictment.

There is, further, no controversy or dispute as to how the understatement occurred. The testimony is, you will recall, that Mr. Bates made out the defendant's income tax returns for the indictment years and Mr. Bates made out the returns from the information and figures which the defendant gave him, and the information and figures that the defendant gave him came from the defendant's books which are in evidence here. The reason for the understatement was that the books were incomplete and incorrect and they were incorrect and incomplete for the reason that the defendant failed to post or enter all of his income in the books. Large amounts of income in the form of checks from purchasers of his logs did not show up in the books at all, and since Mr. Bates used the information from the books and used this on his returns, the returns were incomplete and incorrect because the books were incomplete and incorrect. And the thing you have to determine is whether the defendant acted honestly, innocently and in good faith, or whether on the other hand he acted in bad faith with an evil purpose to cheat or defraud the Government of part of the income tax when he knew he owed the tax. Of course, you must bear in mind, as I shall later on instruct you more in detail, that the plaintiff has the burden of [635] proving the guilt of the defendant beyond a reasonable doubt.

Since the defendant has pleaded not guilty to the indictment, to each of the four counts of the indictment that he is charged with, this imposes upon the Government the burden of proving each and

every material allegation of the indictment to your satisfaction, beyond a reasonable doubt.

The defendant is presumed to be innocent. The presumption is a real thing. It is a real right which he has. It is no mere fiction which either the Court or the jury may ignore. It is one of the defendant's substantial and important rights. It attaches to the defendant and continues with him throughout all phases of the trial and through all the stages of your deliberations as jurors until you have become satisfied from the evidence of his guilt beyond reasonable doubt.

Now, this term "reasonable doubt" as used in these instructions means such a doubt as will cause a reasonable, prudent and considerate person to hesitate or waver before acting upon the truth of the matters charged or alleged. Such a doubt may arise from the evidence in the case or from the lack of such evidence. You will not be swayed, moved or become frightened by doubts which are imaginary, arbitrary or capricious. On the other hand, you will not convict in the face of doubts which are real and substantial. If, after a fair, candid, common-sense consideration of all the [636] evidence in the case, you can say upon your oaths as jurors that you have an abiding conviction of the truth of the charge to a moral certainty, then you have no reasonable doubt and should convict. But, if you have no such conviction of the truth of the charge to a moral certainty, if you entertain doubts for which sensible and satisfactory reasons can be given in your own

minds, you must give the defendant the benefit of such doubt and find him not guilty.

Now, an indictment is but a formal method of accusing a defendant of crime. It isn't evidence of any kind against the accused and does not create any presumption or permit any inference of his guilt.

Now, Ladies and Gentlemen of the Jury: To give you the elements of this offense, first let me point out that the defendant, of course, is accused here of violating a Federal Statute, and so far as you need to consider it here, that Federal Statute provides in part: Any person who wilfully attempts in any manner to evade or defeat any tax imposed, or the payment thereof, shall be punished as the law provides:

Now, in this case the tax referred to is income tax.

The essential elements of each of the charges made herein by the Government, and there is one charge on each count, of course, are:

1. That there was owing to the Government more income tax than that shown in the return made by the defendant during each of the taxable years charged; [637]
2. That the defendant knew that there was owing more income tax than shown by the returns;
3. That he wilfully attempted to evade or defeat any part of such tax by filing or causing to be filed a false return.

If you find the existence of each of these elements beyond a reasonable doubt, you should find the

defendant guilty. If you have any reasonable doubt as to any of these elements, you should find the defendant not guilty.

Now, you will observe that one of the elements of the offenses charged is that the defendant wilfully attempted to evade or defeat payment of his just tax. Wilful attempt means an intentional one, done with bad purpose or evil design to evade payment of income tax due, and it is necessary that the Government prove that in filing his income tax returns the defendant thereby, with such purpose or design intended to evade or defeat the payment of some portion of his income tax. However, it is psychologically impossible for you to enter into the mind of the defendant and determine directly the intent with which he acted. You may therefore determine the purpose and intent from consideration of all of the evidence in the case. In order to secure conviction, it is necessary to prove that the conduct of the defendant was wilful.

If it appears to you that the defendant did not act [638] wilfully, but mistakenly, and there was no wilful intent on the part of the defendant to evade taxes, but the error resulted from honest inadvertence and mistake, then it is your duty to acquit the defendant. But in testing whether or not the action of the defendant making the returns was wilful, you are to take into consideration all the facts and circumstances, including the information that the defendant furnished to the person who made out his income tax returns, the defendant's method of keeping books and doing business, his

failure to record all of his income in his books, and you shall then determine whether the defendant made a good faith, honest disclosure of his income in his tax returns or a dishonest disclosure which he knew to be false, and which he made with an intent to evade the payment of part of his income tax.

Now, even gross carelessness, recklessness or negligence in the preparation of an income tax return, or honest errors of fact or of law, is not fraud, and before the jury can infer the existence of fraud, in this case they must find beyond a reasonable doubt from the evidence that the defendant wilfully, with intent to evade his Federal income taxes, filed or caused to be prepared and filed, a materially false income tax return.

Now, the defendant is here charged with attempting to evade his income tax for the years 1950, 1951, 1952, and [639] 1953, as I have stated. Those years only are involved in the indictment.

The Court nevertheless has permitted evidence of like or similar transactions by the defendant for the years 1948 and 1949. Such evidence is to be considered by you only insofar as it bears upon or relates to the intent of the defendant if you find that he failed to pay the income taxes involved for the years involved in the indictment. In other words, such evidence was admitted for the purpose of throwing light on the intent of the defendant and the same thing would apply to all evidence. There was here another year 1954 and the same rule would apply.

Although there are four counts in the indictment, the defendant is entitled to the same kind of trial

on each count as if he were being tried on each count separately. When you come to deliberate upon the innocence or guilt of the defendant, you will consider each count separately and consider and weigh the evidence as related to that count as if it were the only count in the indictment, and you will return separate findings in your verdict as to each count.

You are the sole judges of what is the evidence and of the credibility and weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of this testimony, by his motives, or by [640] contradictory evidence.

In weighing the testimony of a witness, it is improper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring or an inclination to favor any party? Did he appear to be fair and candid, or otherwise? Was the testimony reasonable and consistent within itself and with uncontradicted facts?

Should you consider any of these questions, either in your own private reasoning or in open

discussion, you must look for an answer to the evidence admitted in the trial of this action and your observation of the witness as to his appearance and demeanor while he was testifying.

In judging the credibility of witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of the evidence or testimony of any witness, as may be dictated to you by your judgment as reasonable men and women. You should carefully scrutinize the testimony given and, in so [641] doing, consider all the circumstances under which the witnesses testified, as I have heretofore recited them to you, and in addition to that, the relation that they might bear to the plaintiff or to the defendants, the interest they may have in the case, the manner in which they might be affected by the verdict, and the extent to which a witness is contradicted or corroborated by other witnesses or other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown to have knowingly testified falsely on the trial touching any material matter, the jurors should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony except insofar as it may be corroborated by other credible evidence in the case.

Now, an expert is an individual who by education, study, training, experience or observation has acquired special knowledge, skill or understanding

in a particular subject or field beyond that of the average person. The only experts who testified in this case were the accountants who were expert accountants.

Where witnesses qualify as experts in a particular field and are allowed to express opinions, rather than to testify to facts, those opinions are for the aid and assistance of the jury, but not for the purpose of invading its functions. The responsibility to decide rests upon the jury. [642] It is your duty to evaluate and appraise the testimony of a witness who expresses opinions precisely as you would evaluate and appraise the testimony of witnesses who testify to facts within their personal knowledge. The rules for determining the credibility of witnesses which I have given you in these instructions apply to expert witnesses as well as to other witnesses.

All evidence received in this case should be given such effect as the jury deems it to be entitled to receive.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of eye witnesses. The other is circumstantial evidence, by which an inference of an unknown fact is drawn from the existence of known facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case. The neces-

sity to resort to circumstantial evidence to prove guilt in criminal trials is apparent.

Now, the purpose and function of evidence of good character and reputation is to raise a reasonable doubt as to innocence or guilt of a particular defendant, and such evidence is entitled to be considered whether the effect of the other evidence in the case is clear or doubtful. Evidence [643] has been introduced upon the trial of this case tending to show and to establish that the defendant is a person whose reputation for truth, and honesty, and as a law-abiding citizen, has been good. When this evidence is considered by you, along with the other evidence introduced at the trial, if a reasonable doubt is created as to the guilt of the defendant by the fact of his good character and reputation, he is entitled to be acquitted. If, on the other hand, you are convinced by all of the evidence, including character evidence, of the guilt of the defendant, you should not acquit him merely because the evidence shows he has a good reputation for the traits of character which I have mentioned.

There have been admitted in evidence certain exhibits consisting of summaries prepared by the witness Paul Simonson. Strictly speaking, these exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evi-

dence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded that it is the books, records and documents which are the evidence, and the summaries are admitted only to assist you in considering that [644] evidence. For that purpose, you are entitled to consider them.

What I have said about these exhibits does not apply to the testimony of the Revenue Agent who prepared them or to other accountant witnesses. Their testimony is evidence and it is to be considered by you as any other evidence.

Now, you are instructed that this is a criminal case and has nothing to do with the determination or collection of income taxes which may be due the United States by the defendant. The income tax liability of the defendants is a matter which does not concern you in this case.

Now, if I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either the plaintiff or the defendant in this case, you should not be influenced by that suggestion. I have tried to be strictly impartial, and if any action or anything I have said or any expression on my part has seemed to indicate the contrary, you are instructed to disregard it.

At times throughout the trial, I have been called upon to pass upon the question of whether certain offered evidence should be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inference from them. Whether offered evidence is admissible is purely a question

of law with which the jury is not concerned. As to any offer of evidence that was rejected, you should not [645] consider the same, and as to any question to which an objection was sustained, you should not conjecture as to what the answer might have been or as to the reason for the objection, and you should disregard entirely any evidence or testimony that the Court has ordered stricken from the record.

Now, from time to time, the attorney for one or the other of the parties has interposed objections to evidence. Counsel not only have the right, but the duty, to make any and all objections which are deemed advisable or appropriate, and no inference or presumption should be indulged in one way or the other by reason of the making of such objections.

You should not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts.

You should pay no attention to what the punishment may be in case you find the defendant guilty. The determination of punishment is the sole responsibility of the Court, and the jury should not be concerned with it at all.

In your deliberations, it goes without saying, there is no room for sympathy, sentiment, prejudice or passion. It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interest of strangers, and to decide the issues strictly upon the merits. [646]

Now, when you retire to the jury room, Ladies and Gentlemen, you will first select one of your number as foreman. It will be the foreman's duty to preside over your deliberations, act as your chairman, so to speak, and sign your verdict as soon as you have agreed upon it. You will take with you to the jury room the indictment and also the exhibits which are admitted in evidence.

We have also prepared for your convenience a form of verdict, and it is quite simple and I am sure you will find no difficulty with the form, and it has the heading or caption of the case. It is entitled, "United States of America, Plaintiff, vs. Joe Palermo, Defendant, No. C-4569," and which is the Clerk's number, and it reads: "We, the jury in the above-entitled cause, find," and then a blank line, and then "the defendant, Joe Palermo," and then you will fill in whether he is guilty or not guilty as charged in Count 1 of the indictment and so on. Now, as to Count 1, if you find that the defendant is guilty, you write the word "is" in the proper space. If you find that he is not guilty, you will write the word "not" in there for the particular count and year; and the same thing is true and it has the same arrangement as to Counts 2, 3, and 4, and then there is a space for the foreman to sign it.

Now, your verdict must be unanimous in this case, that is to say, all twelve of you must agree to return a verdict. [647] And when you have agreed upon it, the foreman will sign it, and then you can let the bailiff know that you are ready to report.

Now, I will ask the bailiff to let the jury step out for a moment while we have some short proceedings in your absence.

(Whereupon, the following proceedings occurred in the absence of the jury.)

DEFENDANT'S EXCEPTIONS

The Court: In the absence of the jury the counsel may now take exceptions to the Court's instructions or failure to give requested instructions.

Mr. Bantz: The plaintiff has no exceptions, your Honor.

The Court: I think that about the only thing that the attorney for the plaintiff, the United States, would be to protest anyway, it wouldn't do much good.

Mr. Bantz: Yes, I know. Yes, I have learned that.

Mr. Moore: With reference to the instructions proffered by the defendant and not given, the defendant, first of all, excepts to the failure to give Requested Instruction No. 1, being for a directed verdict based upon the argument previously presented that the evidence as it has been adduced here——

The Court: By the way, Mr. Moore, I am sure you intended to make Proposed No. 1 to apply to all four counts [648] of the indictment, but through typographical error you have three counts there.

Mr. Moore: I am sorry, your Honor. I didn't see that. Could I correct that by interlineation?

The Court: It says three counts in my notes or my copies. I construed it to mean four, and I suggest that the Clerk line out the word "three" and write in "four" so it will be correct.

Mr. Moore (Continuing): —for the same reasons that I have set forth at the conclusion of the evidence, for the reason that this does not exclude every reasonable hypothesis other than guilt, and the instruction therefore should have been given.

The defendant further excepts to the failure to give proffered Instruction No. 9, reading:

"If the evidence in this case can be reconciled either with the theory of innocence or guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted by the jury. You will review all of the facts and circumstances in the light of this instruction."

It is submitted that the statement set forth in Instruction No. 9 is a proper statement of the law in that the evidence adduced here requires the instruction as the same may be consistent with either theory. [649]

The defendant further excepts to the failure to give proffered Instruction No. 11, reading:

"Unless there is substantial evidence of facts which excludes every other reasonable hypothesis but that of guilt, and if all the substantial evidence is as consistent with innocence as with guilt, then it is your duty to return a verdict of not guilty."

For the reason that the same constitutes a statement of the law and that the evidence requires the rendering of that statement to the jury.

The defendant further excepts to the failure of the Court to give Proffered Instruction No. 12 with reference to circumstantial evidence by reason of the fact that the Court gave no full and complete instruction to the jury with reference to the consideration of circumstantial evidence, and that offered Instruction No. 12 sets forth a proper consideration of the law for the jury.

“Defendant’s Instruction No. 12:

“Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be established. It must be such as to exclude every reasonable doubt of the guilt of the defendant, and if it does not do so, or if you believe the circumstances to be as consistent with innocence as with [650] guilt, it is your duty to acquit the defendant.

“In order to convict on circumstantial evidence, the circumstances relied on must point so unerringly to the guilt of the defendant as to exclude every other reasonable hypothesis. The circumstances thus relied on must be proved by the United States to your satisfaction beyond a reasonable doubt, must be consistent with each other, and inconsistent with every other reasonable theory of innocence.”

I am not certain about this one, your Honor, so I better take exception anyway. With reference to offered Instruction No. 16, I don’t believe that the Court specifically instructed the jury that there was no presumption of guilt which will be drawn from

the act itself. I can't recall. Assuming that there was not, I am saying that they should be advised because that is the law with reference to this case.

“Defendant's Instruction No. 16:

“The filing of an incorrect or inaccurate income tax return is unlawful as to the defendant, only if the defendant did so wilfully, with knowledge of its falseness, and with intent to evade taxes. There is no presumption of guilt which may be drawn from the act itself—both knowledge and wilfulness must be established by the independent proof, direct or circumstantial.”

The Court: I am not aware of any case. Perhaps you [651] have some to cite where the court has held that it is error for a trial court in failing to instruct that no presumption arises from the act itself. They have reversed where the court has instructed that the presumption does arise, the presumption of guilt from understating the return.

Mr. Moore: I don't have any case that says that it is error not to instruct, your Honor. I merely have cases which say that proof of understatement does not raise a presumption of guilt, nor is it proof of intent.

Now, again, defendant excepts to the failure of the Court to give proffered Instruction No. 20 by reason of the fact that this proposed instruction also advises the jury that the fact of the filing of an incorrect income tax return is not sufficient in and of itself to convict the defendant, in that it sets forth the law relating to presumptions set forth in my preceding exception.

“Defendant’s Instruction No. 20:

“In order to secure conviction, it is necessary that the United States prove that the conduct of the defendant was wilful. The mere fact that an incorrect tax return was filed by him is not sufficient to in itself convict the defendant. If you believe the defendant did not act wilfully, but did act mistakenly, carelessly, negligently, or even recklessly, and that he did act in good faith without any wilful intent on his part to evade or defeat any income tax payment, or as [652] the result of inadvertence, misunderstanding, or even careless book-keeping, it is your duty to acquit the defendant.”

The defendant excepts to the failure to give proffered Instruction No. 21 on the same grounds set forth as to proposed Instruction No. 20. The same relates to the direction to the jury that there must be a specific intent to defeat or evade payment of tax due, and that that is a correct statement that there must be a specific intent to defeat or evade payment of tax due. Also with reference to the filing of the incorrect income tax return without ground for believing it to be unlawful, without justifiable excuse or careless disregard, do not constitute wilful intent.

“Defendant’s Instruction No. 21:

“You are instructed that in cases of this character, there is only one state of mind that can supply the intent necessary to sustain a conviction, and that is the specific intent to defeat or evade payment of the tax due; nor would the filing of a false return with any bad purpose supply the necessary in-

tent. The bad purpose must be to evade or defeat the income tax that is due. The filing of any incorrect return, without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right to do so, do not in themselves constitute wilful intent.” [653]

With reference to proposed Instruction No. 24, defendant excepts to the failure to submit that instruction or as is substantially set forth in that instructions, for the reason that in advising the jury of their determination of an intent or wilfulness the Court submitted certain factors to the jury for their consideration; that this proposed instruction includes additional facts.

“Defendant’s Instruction No. 24:

“ ‘Wilfully’ means knowingly and with bad heart and bad intent. It means having the purpose to cheat or defraud, or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, or reckless, or negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books and records. He is not wilfully evading a tax if all that is shown is that he made errors. He is not wilfully evading a tax if he acts without the advice of an accountant or lawyer, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant in the keeping of his books or the preparation of his tax return.”

The Court: That is the one that includes factors that are not in evidence in this case, by keeping a double set of books and concealing the [654] assets?

Mr. Moore: No; I am sorry, unless I have got the numbers wrong. This reads (reading Proposed Instruction No. 24, as above set forth for the purpose of these exceptions).

The Court: Yes; that is all right.

The Court: That is No. 24, is it not?

The Court: Yes.

Mr. Moore: And I take final exception to the failure to give Proposed Instruction No. 29 for the reason that the same is, I would say, a relatively short concise statement of the—that is the last one.

The Court: Yes; I remember that.

Mr. Moore: —of the situation that was being submitted to the jury and set forth in one instruction and briefly the law which they were required to consider in determining the defendant's guilt or innocence, and contained all of the factors necessary for their consideration as to the intent.

“Defendant's Instruction No. 29:

“The basic issue in this case between the Government and the defendant is the question of whether the admitted underreporting of income by the defendant was the result of a wilful attempt by the defendant to evade income tax for the years under consideration. The Government has the burden of proving to you beyond a reasonable doubt that the defendant did wilfully attempt tax evasion, which the defendant [655] denies. ‘Wilful attempt’ con-

sists of two elements, the attempt itself, and knowing criminal intent. In determining the question of 'wilful' before you may find against the defendant on any count of the indictment you must find beyond a reasonable doubt that at the time of the preparation and filing of defendant's income tax return for the tax year of such count, defendant had the specific intent to or bad purpose of thereby evading or defeating the payment of his proper income tax, that is, a criminal intent.

"The intent, if any, with which an individual performs an act cannot be proved by others, normally, except by circumstantial evidence. Certain acts or conduct may be used by you in making a determination of whether or not the defendant had such specific criminal intent, while other acts or conduct may not. Acts or conduct from which an affirmative wilful attempt to evade may be inferred are such as deliberate concealing of assets, keeping two sets of books, making of false entries, invoices, or alteration in books, covering up sources of income, deliberate destruction of records, and other conduct the likely effect of which would be to mislead or conceal. However, the fact of understatement of income, the amount of the deficiency of tax or income, or disparity between income received and income reported cannot be considered as a factor proving or tending to prove the specific criminal intent. No presumption of criminal intent arises merely because of the underreporting of income itself. [656] In addition, acts or conduct which are the result of carelessness, negligence, ignorance, or inadvertence may not be

used to infer the specific criminal intent because such acts or conduct would negative the existence of the necessary condition of intent itself.

“Further, in your consideration of such facts, if any be present in this case, it is essential, before you may infer specific criminal intent from any acts or conduct of the defendant, that such acts or conduct be consistent with the theory of the defendant’s innocence, and exclude every reasonable doubt of the defendant’s guilt.

“Therefore, your process of consideration of the element of specific criminal intent on each count should be as follows: First, determine whether or not you can find beyond a reasonable doubt the existence of acts or conduct on the part of the defendant, from which, as circumstantial evidence, you feel you might infer the existence of a specific criminal intent in the defendant to evade or defeat his income tax. If you find no such acts or conduct at this point, you must acquit the defendant without further consideration. Second, if you do so find, then determine whether those acts and conduct are consistent with the theory of defendant’s guilt, inconsistent with every reasonable theory of the defendant’s innocence, and exclude every reasonable doubt of the defendant’s guilt. If you conclude that these [657] three conditions exist as to such facts, then you should find one of the essential factors necessary to determine the defendant’s guilt—the existence of the specific criminal intent. However, if having found such acts or conduct to exist, you do not find that they are consistent with the theory

of the defendant's guilt, or if you do not find that they are inconsistent with every reasonable theory of defendant's innocence, or if you do not find that they exclude every reasonable doubt of the defendant's guilt, then or in either of those events, you must acquit the defendant."

(Whereupon, the following proceedings occurred in the presence of the jury:)

The Court: The Clerk will swear the bailiffs.

Now, the alternate juror will be excused, and since this is the last case you will be excused permanently. The principal jurors will retire to consider their verdict. [658]

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Henry E. Neer, do hereby certify:

That at all times herein mentioned, I was Acting Official Court Reporter of the United States District Court for the Eastern District of Washington; that as such reporter I reported in shorthand and transcribed into typewriting the proceedings in the instant cause upon its trial commencing Tuesday, July 23, 1957, and ending on Tuesday, July 30, 1957; that the transcript covering these periods is a full, accurate and complete transcript of the testimony and the proceedings had.

Dated this 14th day of November, 1957, at Yakima, Washington.

/s/ HENRY E. NEER,
Acting Official Court
Reporter.

[Endorsed]: Filed October 30, 1957. [659]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above cause as called for in Appellant's Designation filed on September 13, 1957,

12- 7-56—Indictment.

10-30-57—Reporter's Transcript of Arraignment.

Reporter's Transcript of proceedings at the trial.

All exhibits admitted (mailed under separate cover).

7-26-57—Defendant's Proposed Instructions, Nos. 1, 9, 11, 12, 16, 20, 21, 24 and 29.

7-30-57—Verdict of the Jury.

7-30-57—Judgment upon the Verdict.

7-31-57—Motion for Judgment of Acquittal or in the Alternative for a New Trial.

Reporter's Transcript of argument on motion.

9- 9-57—Order Denying Motion for Judgment of Acquittal of in the Alternative for a New Trial.

9- 9-57—Notice of Appeal.

9-13-57—Designation of Record on Appeal.

10-10-57—Order Extending time to file record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said district this 27th day of November, 1957.

[Seal] STANLEY D. TAYLOR,
Clerk of Said Court;

By /s/ THOMAS GRANGER,
Deputy.

[Endorsed]: No. 15809. United States Court of Appeals for the Ninth Circuit. Joe Palermo, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed November 29, 1957.

Docketed: December 6, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15809

UNITED STATES OF AMERICA,

Appellee,

vs.

JOE PALERMO,

Appellant.

STATEMENT OF POINTS RELIED
UPON ON APPEAL

The appellant states that in his appeal to the United States Court of Appeals, Ninth Circuit, from the judgment entered in the above-entitled cause on July 30, 1957, and the Order Denying Appellant's Motion for Judgment of Acquittal or in the alternative for a New Trial entered in the above-entitled cause on 9th day of September, 1957, pursuant to the Rules of Criminal Procedure, appellant intends to rely upon the following points:

1. The Trial Court erred in failing to grant appellant's Motion at the close of the trial for Judgment of acquittal of appellant.
2. The Trial Court erred in failing to grant appellant's Motion, Post Trial, for Judgment of Acquittal.
3. The Trial Court erred in failing to grant appellant's Post Trial Alternative motion for New Trial.

4. The Trial Court erred in failing to give appellant's Instructions Nos. 1, 9, 11, 12, 16, 20, 21, 24, and 29.

5. The Trial Court erred in the admission of Exhibits Nos. 26, 27, 28, 29, 30, 33, and 34 over the objection of appellant by reason of insufficient and/or improper identification thereof.

6. The Trial Court erred in the admission over the objection of the appellant of Exhibits 1, 2, 14, 15, 22, 25, 26, 33, 34, 42, 43, 46, 70, 77, 78, 80, 85, 91 and 92, the same being irrelevant and immaterial.

Dated this 3rd day of December, 1957.

/s/ JOHN S. MOORE,

/s/ E. S. VELIKANJE,

Attorneys for Appellant.

[Endorsed]: Filed December 6, 1957.

No. 15809

IN THE

United States
Court of Appeals
FOR THE NINTH CIRCUIT

JOE PALERMO,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

*On Appeal from the District Court of the
United States for the Eastern District
of Washington*

BRIEF FOR THE APPELLEE

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No. 15809

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

JOE PALERMO,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

*On Appeal from the District Court of the
United States for the Eastern District
of Washington*

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The statement of jurisdiction as set forth in appellant's brief with reference to the statutes therein indicated is accepted as accurate.

ADDITIONAL STATEMENT OF FACTS

Appellee generally accepts the statement of facts as set forth by the appellant except to add the following:

On Page 3 of appellant's brief it is stated that appellee made no attempt to attack the deductible business expenses taken by appellant on his returns for the indictment years although there were mistakes in the returns as to such expenses. If any deductions were left out, they were inconsequential as the appellant admitted the amount of tax due as alleged by the appellee was correct and this was admitted without objection. (Pl. Ex. 93-96; R. 319-321, 323).

The appellee not only alleged the under-statement of income for all of the indictment years but showed exactly the under-statement by producing the evidence in the form of checks, statements, ledgers, or other financial records, and testimony of witnesses.

To substantiate appellee's position, a net worth statement, was admitted without objection. (Pl. Ex. 66; R. 185, 188).

Appellant showed a definite and deliberate pattern or scheme by withholding each year a number of checks that were solely within his knowledge and under his care, custody and control. (R. 393-395, 397-398).

During the four indictment years appellant received two hundred thirty-five (235) checks from the sale of logs or other services. Ninety-nine (99) of those checks were not recorded on the books and records of appellant. 42.1 percent of the checks received during the indictment years were not recorded on the books. (R. 290). In addition to the indictment years, appellant in 1948 received twenty-seven (27) checks of which twenty (20) checks were not reported. (Pl. Ex. 91; R. 293-298). In 1949 appellant received forty-two (42) checks of which twenty-four (24) were not reported. (Pl. Ex. 92; R. 300-302). Exhibits (Pl. Ex. 91 and 92) were admitted by the Court with proper instructions as to how they were to be considered by the jury. (R. 245, 295, 559).

In 1955 appellant withheld from his accountant in connection with his 1954 income tax return, approximately \$4,960.67 in gross receipts, which apparently were the receipts from about twenty (20) checks. (R. 439).

Although the chief claim of appellant is that he negligently under-reported his income and negligently underpaid income tax on it, (Br. 3) in our opinion his statement of facts does not adequately set forth the evidence in the record, which plainly showed he "knowingly and wilfully" perpetrated income tax evasion. Since the argument which will follow later

in the brief discusses this evidence fully, it will not be repeated at this point.

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ANSWER TO APPELLANT'S SPECIFICATION OF ERROR

(a) *In reference to alleged Error No. 1.* There was no basis for the Court to grant appellant's Motion for Judgment of Acquittal.

The Trial Court in denying this motion very clearly set forth his, as well as our reason on Page 365 of the Record.

"The circumstances here are that large amounts were involved and that in quite a number of instances receipts were not deposited in the bank or deposited in the bank and not recorded, and that would be sufficient to take the case to the jury."

At Page 366 of the Record the Court further states:

"Coupled with consistent failure to put on his books large amounts which he has received from logging companies. In some instances the whole amount that he has received from certain buyers is not put on his books at all. That is exactly what the man does if he wants not to show his income. He can show his books and the statement is correct. It seems to me that this statement without any confession is sufficient to take the case to the jury. It is for the jury to determine the force and effect of it and what inference to draw in the light of the explanations."

(b) *In reference to alleged Error No. 2.* In reference to the "Not Guilty" instruction.

It is the duty of the Court to submit the case to the jury when there is sufficient evidence to show a prima facie case and this is covered in the answer to alleged Error No. 1 above.

(c) *In reference to alleged Error No. 3.* There is no basis for a new trial.

Appellee produced proper and sufficient evidence at the trial to sustain the verdict of the jury. The Court did not err in its instructions and there was no error in the admission of documentary evidence. The case was properly submitted to the jury and the jury rendered a proper verdict.

(d) *In reference to alleged Error No. 4 through No. 11.* These specifications of error all deal with proposed instructions of the appellant.

All of the proposed instructions were substantially covered by the Court in its instructions. The Trial Court's instructions were not quite so voluminous but they did cover each and every element requested by the appellant except that he gave them in a clear and concise manner setting forth the instructions in such a manner that they could be understood by the jury. *Holland v. United States*, 348 U. S. 121.

In reference to proposed instruction 16, appellee feels that the Judge answered this specification of error at the time of trial. (R. 570).

(e) *In reference to alleged Error No. 12 through No. 15.* The objection as to the admissibility of plaintiff's exhibits 77 and 78 by appellant because of insufficient identification is not well taken.

The record shows that Lyle Lumber Company was sold to Everett Thoren and the assets of the Lyle Lumber Company became part of the Thoren Lumber Company. (R. 213). Everett Thoren received the books and records of the Lyle Lumber Company and he had them in his possession. (R. 213). The records were identified by Thoren and shown to be connected with the appellant in this case. (R. 214-216; Pl. Ex. 77-78). Simonsen, the Internal Revenue Agent, testified that he had personally checked the items in the exhibits in making up his summaries (Pl. Ex. 91-92) and that he cross-checked the items in plaintiff's exhibits 77 and 78 with the bank deposit slips of appellant and that they matched. (R. 292-297). This sufficiently identified plaintiff's exhibits 77 and 78 with the appellant and this case to make them admissible in evidence, and once admitted they could be used in the summaries admitted in evidence. Appellee submits that the summaries were proper and were compiled from the evidence properly admitted in this trial (R. 214-216, 292-297) and that the Trial Judge gave the proper instructions as to their use by the jury. (R. 563-564). *United States v. Johnson*, 319 U. S. 503; *Costello v. United States*, 350 U. S. 359.

ARGUMENT

THE EVIDENCE CLEARLY ESTABLISHED THAT APPELLANT KNOWINGLY AND WILFULLY PERPETRATED INCOME TAX EVASION AS ALLEGED IN THE INDICTMENT.

The principal issue in this appeal is whether there was substantial evidence from which the jury could find that appellant "knowingly and wilfully" perpetrated income tax evasion. To reach his conclusion appellant reweighs the evidence of the case as submitted to the jury and concludes that appellant merely negligently failed to report his proper income and negligently failed to pay his proper income tax.

This Court has repeatedly held that in reviewing the record at this time it must take the view of the evidence which is most favorable to the Government and accept as true all the facts which the evidence reasonably tended to show. As stated by this Court in *Suetter v. United States*, 140 F. 2d 103, 107 (CA 9, 1944):

" 'A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial before the jury, fairly tending to sustain the verdict.' *Abrams v. United States*, 250 U. S. 616, 619; 40 S. Ct., 17, 18, 63 L. Ed. 1173. The evidence must be considered in the light most favorable to appellee. *Holmes v. United States*, 8 Cir., 134 F. 2d 125,

130; *Hemphill v. United States*, 9 Cir., 120 F. 2d 115, 117.”

In a case such as this, the defense of “negligence” in business affairs is but another way of stating that appellant did not “knowingly and wilfully” commit income tax evasion. As was stated in *Remmer v. United States*, 205 F. 2d 277, 288 which related to fraud in an income tax evasion case:

“A state of mind can seldom be proven by direct evidence but must be inferred from all the circumstances.”

The jury after consideration of all the evidence, including the defense of negligence, resolved all issues against the contentions of appellant.

It appears that the appellant feels that he should be acquitted because he was consistently poor in his bookkeeping, but it appears to the appellee that he was more consistent than truthful.

Appellant had knowledge of his filing a false return and this knowledge and wilfulness was proved by the appellee. There was an abundance of evidence showing a consistent pattern or scheme of under-reporting a large amount of taxable income and of the failure on the part of the appellant to include all of his income in his books and records that were submitted to his accountants for the purpose of preparing his tax return. This is sufficient to sustain the

conviction. *Holland v. United States*, supra; *Spies v. United States*, 317 U. S. 492.

The testimony in the case shows without question that a pattern or scheme was followed by appellant in withholding taxable income not only the years covered in the indictment but before and afterwards. By having this pattern and scheme he cannot then say it was an under-statement only because of carelessness but was done knowingly and wilfully.

Appellant puts great stress on circumstantial evidence and that the Trial Judge did not cover this properly, but appellee submits circumstantial evidence is no different from direct evidence. *Holland v. United States*, supra. The Court correctly instructed on circumstantial evidence. (R. 562).

The appellant relies heavily on the fact that his proposed instructions were not given. In reading them they would add nothing to the case but confusion. The Trial Court in this case gave sufficient and adequate instructions in clear and concise wording covering every facet of the law which the appellant now feels the Court neglected to give. The reading of the instructions as a whole will show that all the necessary instructions in an income tax case were given by the Trial Judge. In *Wright v. United States*, 175 F. 2d 384 at 388, the Court held:

“Fortunately, a trial judge in formulating his charge is entitled to use his own language and is not required to let counsel for either party put words into his mouth. If the charge is accurate and gives to the jury all of the law which it needs in order to reach a verdict that is enough.”

See also *Bloch v. United States*, 221 F. 2d 786 at 787.

Appellee's position in reference to this case is generally set forth and affirmed in the following cases:

Costello v. United States, 350 U. S. 359

Spies v. United States, 317 U. S. 492

Epstein v. United States, 246 F. 2d 563

Blackwell v. United States, 244 F. 2d 423

Bloch v. United States, 221 F. 2d 786

Holland v. United States, 348 U. S. 121

CONCLUSION

For the reasons set out herein it is submitted that the judgment of the United States District Court should be affirmed.

Respectfully submitted,

WILLIAM B. BANTZ,
United States Attorney.

RINER E. DEGLOW,
Assistant United States Attorney.

No. 15809

IN THE

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UPON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF OF APPELLANT

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UPON APPEAL FROM THE DISTRICT COURT OF
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SOUTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Appellant was charged by indictment in the United States District Court for the Eastern District of Washington, Southern Division, upon four counts of income tax

evasion for the four calendar years of 1950 to 1953, inclusive, for violation of 26 U.S.C. section 145 (b), (now 26 U.S.C. section 7201) in wilfully attempting to evade or defeat income taxes and the payment thereof for such years. (3-7)

Following appellant's plea of not guilty (25-27), and trial before a jury, a verdict of guilty on all four counts was rendered (13), and Judgment and Commitment was entered and filed July 30, 1957 by the trial court. (14-15) Appellant timely filed Motion for Acquittal or in the alternative for New Trial (15-16), which was denied by order of the court entered and filed September 9, 1957. (21-22) Notice of Appeal was filed September 9, 1957 (22-23), and Order Extending Time to File Record on Appeal was filed October 10, 1957. (24) Jurisdiction of the trial court was founded upon 18 U.S.C. section 3231, granting original jurisdiction to district courts of all offenses against the United States.

Appellant invokes the jurisdiction of this Court under the provisions of 28 U.S.C. section 1291, which provides that a Circuit Court of Appeals shall have jurisdiction of appeals from all final decisions of district courts.

STATEMENT OF THE CASE

Appellant, a logger of White Salmon, Washington, was indicted for income tax evasion for the calendar tax years of 1950 to 1953, inclusive (3-7). Following the entry of his plea of not guilty as to all four counts of the indictment (25-27), trial was had by jury, commencing July 23, 1957 before the Honorable Sam M. Driver, United States District Judge, Eastern District of Washington, at Yakima, Washington (27).

The main issue of the trial, as indicated by counsel in their opening statements to the jury (30-40), was whether appellant "knowingly and wilfully" attempted income tax evasion. Appellee sought to prove and did prove that for each of the indictment years appellant had underreported his income and underpaid income tax due thereon. Although the proof of underreporting included the net worth method (34, Pltf Exh 66), appellee relied mainly upon proof of understating of specific items of gross receipts (34). No attempt was made by appellee to attack the deductible business expenses taken by appellant on his returns (34), although there were mistakes in the returns as to such items (34). Appellant admitted the fact of underreporting for the indictment years (39), relying solely on the carelessness or inadvertence of maintaining a poor system of bookkeeping and negligence in providing information for the preparation of tax returns

(40).

To prove the underreporting of income, appellee introduced in evidence appellant's income tax returns for the years in question (Pltf Exh 3, 4, 5, 6; 43-45) and photostats of pages in appellant's record books showing sales of logs (Pltf Exh 71, 72, 73, 74; 188-189), to demonstrate the gross receipts as reported by appellant on his tax returns and as maintained in these record books. Appellee then introduced numerous exhibits consisting of records obtained from mills and companies who did business with appellant during the indictment years; such records included cancelled checks or photostats thereof, supporting invoices, journal sheets and log purchase records, showing payments to appellant by check. For purposes of simplifying the evidence for the jury all of this information was then summarized by Paul Simonson, revenue agent witness for appellee. These summaries included additional information provided by other exhibits showing deposits of income by appellant in his two bank accounts at the Bank of Stevenson, Stevenson, Washington, and the National Bank of Commerce at White Salmon, Washington. The summary for the year 1950 is Pltf Exh 86 (260, 287); for the year 1951, Pltf Exh 87 (262-268, 287); for the year 1952, Pltf Exh 88 (269-278, 287); and for the year 1953, Pltf Exh 89 (278-285, 288). These summaries may be further summarized as follows:

Year	Income	Recorded In Book	Not in Book	Deposited	Not Deposited
1950	\$ 82,964.64	\$ 66,090.94	\$16,873.70	\$ 80,444.20	\$2,520.44
1951	120,129.70	98,178.22	21,951.48	118,948.79	1,180.91
1952	127,410.77	97,952.27	29,458.50	125,724.32	1,686.45
1953	116,865.89	102,901.73	13,964.16	111,886.16	4,979.73

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Year	Income Sources	Checks Received	In Book	Not in Book	Dep'd	Not Dep'd
1950	7	53	37	16	45	8
1951	5	54	29	25	48	6
1952	12	67	28	39	57	10
1953	5	61	42	19	49	12

After establishing the true gross income of appellant for these years, appellee then made use of the deductible expenses as filed in the original income tax returns to compute the net income (or adjusted gross income for tax return purposes) to show the correct tax due for each of the four years as follows: 1950, by Pltf Exh 93 (318, 319); 1951, by Pltf Exh 94 (319, 320); 1952, by Pltf Exh 95 (320, 321); 1953, by Pltf Exh 96 (321-323). In each of the indictment years, appellee's proof of net or adjusted gross income and income tax due correspond with the indictment, and established appellant's income tax delinquency as follows:

1950	-----	\$ 3,944.90
1951	-----	8,454.18
1952	-----	13,447.68
1953	-----	5,432.36

Having established the underreporting of income and the underpayment of income tax for the indictment years, appellee then sought proof of criminal intent by introducing evidence of underreporting of income for the additional years of 1948, 1949, and 1954. For the first two years, appellee again introduced evidence of gross income by cancelled checks, photostats thereof, invoices, journal sheets, and log purchase records. These were then summarized by the revenue agent, Simonson, for the year 1948 in Pltf Exh 91 (293, 297) and for the year 1949 in

Pltf Exh 92 (300-302). These again demonstrated that for these two years, appellant had not recorded in his book all of his gross income, and, when compared with his tax returns for those two years (Pltf Exh 1 and 2; 43, 45, 246, 295), had not reported all of his gross income thereon.

The information contained in Pltf Exh 91 included and was based in part upon information contained in Pltf Exh 77 (293); and that contained in Pltf Exh 92 included and was based in part upon information contained in Pltf Exh 78 (300). Pltf Exh 77 consisted of checks made payable by Lyle Lumber Company to Joe Palermo during 1948, which checks were found in a box on Lyle Lumber Company premises when that company was acquired by Thoren Lumber Company in 1953 (212-216). Pltf Exh 78 were similar checks for the year 1949 (212-216). No further identification was made.

When Pltf Exh 77, 78, 91, and 92, were offered in evidence, appellant objected to the introduction of 77 and 78 because of insufficient identification and also objected to 91 and 92, they being based upon 77 and 78, respectively (294, 295, 302).

Appellee's proof of underreporting of income for the year 1954 was through the testimony of Allen Brown, appellant's accountant. Brown testified that he first became acquainted with appellant in October, 1954, when ap-

pellant requested assistance because he was being investigated by Blankenship, revenue agent, as to his income tax returns (418). In 1955, Brown made out appellant's 1954 income tax return (437, 438). Despite appellant's knowledge at that time that he was being investigated by the internal revenue, about \$4960.67 was omitted from his gross income in his 1954 return (439).

The additional evidence introduced by appellee for the purpose of showing criminal intent on the part of appellant concerned the submission of a financial statement by the accountant Brown to the revenue agents which did not include upon the assets side of the ledger a \$10,000.00 savings account in the Bank of Stevenson (185, 418, Pltf Exh 66). Brown's testimony concerning this evidence indicated that he had prepared the information between the time he first met appellant in October of 1954 and its delivery to the revenue agents in December of 1954, and that he assumed all responsibility for the inadvertent omission of this item from the statement (418-420). Additionally, one of the revenue agents, Blankenship, was told, at his first meeting with appellant, that appellant had funds in the Bank of Stevenson (337, 338, 480, 481).

Appellant's evidence demonstrated that appellant, a naturalized citizen born in Canada in 1909, had grown up in western Washington, the son of a farmer (447, 448).

He went to the eleventh grade in school, and then became employed in a sawmill (448). For some years he worked for sawmill and logging operators until 1932 when he was married (448). From 1932 until the latter part of 1947, he worked for others in logging, both driving truck and cutting logs (448-449). During all this period of time he had no supervisory experience or duties, nor bookkeeping experience or training (452). During the latter part of 1947, his father-in-law, W. A. Zunke, sold appellant some logging equipment on time, and appellant commenced logging for hire (113-115, 450). Some two years later, appellant began acquiring timber lands for himself and restricted his logging operations to the cutting, hauling and selling of his own timber (451). When appellant commenced his business he did not have nor acquire the services of a bookkeeper or accountant (462). He attempted to keep his own records for each year, showing monies received, labor expenses, stumpage purchased, etc. (462, 463, Deft Exh 98, 99, 100). All entries were made by appellant in these books (461, 462). Appellant received his income by checks at various times throughout the year from his customers who were mill operators (463, Pltf Exh 86, 87, 88, 89). He was actively engaged in running his business of cutting and hauling logs from the woods to the mills, having only about six employees at the most (451, 465, 386, 387). His attempts at bookkeep-

ing were confined to evening hours and Sundays (387, 463-465). His hours of work were from about 6:30 A. M. to 6:00 P. M. or later (386, 387, 464). He attempted to pay his bills, make his income entries, and get his deposits ready at odd hours when possible (387, 388, 464, 465).

When he first started the process of having Mr. Bates, White Salmon insurance and real estate man, do his income tax returns, appellant took his books, bank deposits, etc. to Bates, who directed appellant to do the computing of income and expenses and bring the information to him (466, 467). Appellant, believing his books to be the same as his income, used the totals in his books in providing Bates with his gross income figures (467-472). Admittedly, these figures were wrong. However, appellant's testimony was that he attempted to record in his books all of his income, that he believed these figures of his gross income to be correct when given to Bates, that he believed his returns for the income tax prepared by Bates from this information were correct, and that he had no intent to evade his income taxes (462-472).

Appellant maintained a checking account at the Bank of Stevenson, Stevenson, Washington from 1948 to 1952, having originally established the account at the Bank's request, after financing a "cat" purchase through the Bank (474, 475). Upon the termination of this checking

account, he transferred the \$10,000.00 into a savings account at that same Bank (419, 420, 475). Most all of appellant's banking of funds has been done through his checking account at the White Salmon Branch, National Bank of Commerce, White Salmon, Washington (475). This has been appellant's home town since before 1947 (449). White Salmon is a small town in south central Washington, adjacent to the Columbia River, having a population of about 1200-1500 people; close by is another small town, Bingen, in which are located most of the mill operators with whom appellant did business (353). Except for the checking and savings accounts in the Bank of Stevenson, practically all of appellant's income was deposited in the White Salmon Bank (Pltf Exh 86-89).

During the period following his start in business on his own appellant acquired four small rental houses in White Salmon, finished paying for the home which he had purchased before, bought mining stock in a locally organized mining corporation, and purchased timber lands, and logging equipment (453, 454, 457, 475, 476). Other than these purchases, he made no investments of size until 1954 when he purchased a hotel business in Hood River, Oregon, just across the Columbia River from his home in White Salmon (478). Three of the rental houses were

turned in on this purchase, the other being retained as a shop (497). Appellant did not make a thorough investigation of this business before purchasing, and later found out that the former owners had gone bankrupt operating the hotel (507). This situation was not altered, and during his ownership, appellant lost approximately \$1,000.00 per month (436, 437).

Appellant and his family live in a modest frame home, acquired in 1950 for \$10,000.00 (371, 453, 454). There was no evidence of money hidden in safety deposit boxes or secret bank accounts. There was no evidence of any attempt by appellant to secrete or conceal property of any kind or nature. In 1953, appellant purchased a Cadillac automobile on a conditional sales contract, having at that time in his checking account at White Salmon \$55,606.62 (454, 455). In 1953, appellant filed an application for a timber cutting bond with McCoy Insurance Agency in White Salmon, as agents for American Bonding Company; included in the application was a financial statement wherein appellant set forth cash assets of \$50,000.00 in the White Salmon Bank (Pltf Exh 31; 99-101, 104-109).

Character witnesses presented by the appellant included Keith McCoy, White Salmon insurance man who had known appellant fifteen years; W. A. Zunke, appellant's father-in-law, who had known appellant over twenty

five years; Marion Babb, White Salmon bank manager who had known appellant five or six years; Joe Crowe, White Salmon logger and Klickitat County Commissioner, who had known appellant twenty one years; Theodore Sprague, White Salmon logger and sawmill operator since 1945; and Edward P. Reed, White Salmon attorney, who had known appellant professionally and socially for six years (368, 377, 401, 405, 408, 411). These parties testified that appellant's reputation for honesty, truthfulness and as a law-abiding member of the community in the Bingen-White Salmon area was good (369, 380, 402-403, 406-407, 409, 412).

In addition to appellant's books (Deft Exh 98, 99, 100), there were placed in evidence all of appellant's cancelled checks, bank statements, and bank deposit slips (Deft Exh 108, 109; 459-461). Although these exhibits clearly demonstrate omissions of income and income sources in appellant's books (Deft Exh 98, 99, 100), appellant at all times retained these items and made them available to the revenue agents (460, 480, 481).

At the close of appellee's evidence, appellant moved for judgment of acquittal, which motion was denied (365-367). At the close of all of the evidence, appellant again moved for judgment of acquittal, which the court denied (515). Appellant submitted proposed instructions 1, 9,

11, 12, 16, 20, 21, 24 and 29 (7-13), which the court refused to give and to which appellant excepted before the jury retired to consider the verdict (567-576). The jury returned a verdict of guilty on all four counts of the indictment on July 30, 1957 (13), and on the same date Judgment and Commitment was entered and filed, fining appellant \$2500.00 on each of the four counts and sentencing appellant to six months' imprisonment on each of the four counts, the sentences of imprisonment to run concurrently (14, 15). Appellant timely filed Motion for Judgment of Acquittal or in the alternative for New Trial (15-16) which the court denied by order of September 9, 1957 (21-22). Appellant thereupon filed notice of appeal on September 9, 1957 (22, 23).

SPECIFICATION OF ERRORS

1.

The trial court erred in denying appellant's motions for judgment of acquittal (16-22, 515).

2.

The trial court erred in failing to give appellant's proposed Instruction No. 1:

"You are instructed to return a verdict of "Not Guilty" as to all four counts of the indictment against the defendant herein." (7)

" . . . the defendant . . . excepts to the failure to give

Requested Instruction No. 1, being for a directed verdict based upon the argument previously presented that the evidence as it has been adduced here . . . for the same reasons that I have set forth at the conclusion of the evidence, for the reason that this does not exclude every reasonable hypothesis other than guilt, and the instruction therefore should have been given." (567, 568)

3.

The trial court erred in denying appellant's alternative motion for new trial (15-22).

4.

The trial court erred in failing to give appellant's proposed Instruction No. 9:

"If the evidence in this case can be reconciled either with the theory of innocence or guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted by the jury. You will review all of the facts and circumstances in the light of this instruction." (8)

"The defendant further excepts to the failure to give proffered Instruction No. 9, . . . It is submitted that the statement set forth in Instruction No. 9 is a proper statement of the law in that the evidence adduced here requires the instruction as the same may be consistent with either theory." (568)

5.

The trial court erred in failing to give appellant's proposed Instruction No. 11:

“Unless there is substantial evidence of facts which excludes every other reasonable hypothesis but that of guilt, and if all the substantial evidence is as consistent with innocence as with guilt, then it is your duty to return a verdict of not guilty.” (8)

“ . . . for the reason that the same constitutes a statement of the law and that the evidence requires the rendering of that statement to the jury.” (568)

6.

The trial court erred in failing to give appellant’s proposed Instruction No. 12:

“Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be established. It must be such as to exclude every reasonable doubt of the guilt of the defendant, and if it does not do so, or if you believe the circumstances to be as consistent with innocence as with guilt, it is your duty to acquit the defendant.

“In order to convict on circumstantial evidence, the circumstances relied on must point unerringly to the guilt of the defendant as to exclude every other reasonable hypothesis. The circumstances thus relied on must be proved by the United States to your satisfaction beyond a reasonable doubt, must be consistent with each other, and inconsistent with every other reasonable theory of innocence.” (8)

“The defendant further excepts to the failure of the Court to give Proffered Instruction No. 12 with reference to circumstantial evidence by reason of the fact that the Court gave no full and complete instruc-

tion to the jury with reference to the consideration of circumstantial evidence and that offered instruction No. 12 sets forth a proper consideration of the law for the jury." (569)

7.

The trial court erred in failing to give appellant's proposed Instruction No. 16:

"The filing of an incorrect or inaccurate income tax return is unlawful as to the defendant, only if the defendant did so wilfully, with knowledge of its falseness, and with intent to evade taxes. There is no presumption of guilt which may be drawn from the act itself—both knowledge and wilfulness must be established by the independent proof, direct or circumstantial." (9)

"With reference to offered Instruction No. 16, I don't believe that the Court specifically instructed the jury that there was no presumption of guilt which will be drawn from the act itself. I can't recall. Assuming that there was not, I am saying that they should be advised because that is the law with reference to this case." (569, 570)

8.

The trial court erred in failing to give appellant's proposed Instruction No. 20:

"In order to secure conviction, it is necessary that the United States prove that the conduct of the defendant was wilful. The mere fact that an incorrect tax return was filed by him is not sufficient to in itself convict the defendant. If you believe that the defendant did not act wilfully, but did act mistakenly,

carelessly, negligently, or even recklessly, and that he did act in good faith without any wilful intent on his part to evade or defeat any income tax payment, or as the result of inadvertence, misunderstanding, or even careless bookkeeping, it is your duty to acquit the defendant." (9)

" . . . defendant excepts to the failure of the Court to give proffered Instruction No. 20 by reason of the fact that this proposed instruction also advises the jury that the fact of the filing of an incorrect income tax return is not sufficient in and of itself to convict the defendant, in that it sets forth the law relating to presumptions set forth in my preceding exception." (570)

9.

The trial court erred in failing to give appellant's proposed Instruction No. 21:

"You are instructed that in cases of this character, there is only one state of mind that can supply the intent necessary to sustain a conviction, and that is the specific intent to defeat or evade payment of the tax due; nor would the filing of a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the income tax that is due. The filing of any incorrect return, without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one had the right to do so, do not in themselves constitute wilful intent." (9, 10)

"The defendant exccepts to the failure to give proffered Instruction No. 21, on the same grounds set forth as to proposed Instruction No. 20. The same relates to the direction to the jury that there must be a spe-

cific intent to defeat or evade payment of tax due. Also with reference to the filing of the incorrect income tax return without ground for believing it to be unlawful, without justifiable excuse or careless disregard, do not constitute wilful intent." (571)

10.

The trial court erred in failing to give appellant's proposed Instruction No. 24:

"'Wilfully' means knowingly and with a bad heart or bad intent. It means having the purpose to cheat or defraud, or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, or reckless, or negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books and records. He is not wilfully evading a tax if all that is shown is that he made errors. He is not wilfully evading a tax if he acts without the advice of an accountant or lawyer, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant in the keeping of his books or the preparation of his tax return." (10)

"With reference to proposed Instruction No. 24, defendant excepts to the failure to submit that instruction or as is substantially set forth in that instruction, for the reason that in advising the jury of their determination of an intent or wilfulness the Court submitted certain factors to the jury for their consideration; that this proposed instruction includes additional facts." (572)

11.

The trial court erred in failing to give appellant's

proposed Instruction No. 29:

“The basic issue in this case between the Government and the defendant is the question of whether the admitted underreporting of income by the defendant was the result of a wilful attempt by the defendant to evade income tax for the years under consideration. The Government has the burden of proving to you beyond a reasonable doubt that the defendant did wilfully attempt tax evasion, which the defendant denies. ‘Wilful attempt’ consists of two elements, the attempt itself, and knowing criminal intent. In determining the question of ‘wilful’ before you may find against the defendant on any count of the indictment you must find beyond a reasonable doubt that at the time of the preparation and filing of defendant’s income tax return for the tax year of such count, defendant had the specific intent to file an income tax return understating his income with the evil motive or bad purpose of thereby evading or defeating the payment of his proper income tax, that is, a criminal intent.

The intent, if any, with which an individual performs an act cannot be proved by others, normally, except by circumstantial evidence. Certain acts or conduct may be used by you in making a determination of whether or not the defendant had such specific criminal intent, while other acts or conduct may not. Acts or conduct from which an affirmative wilful attempt to evade may be inferred are such as deliberate concealing of assets, keeping two sets of books, making of false entries, invoices, or alterations in books, covering up sources of income, deliberate destruction of records, and other conduct the likely effect of which would be to mislead or conceal. However, the fact of understatement of income, the amount of the deficiency of tax or income, or disparity between

income received and income reported cannot be considered as a factor proving or tending to prove the specific criminal intent. No presumption of criminal intent arises merely because of the underreporting of income itself. In addition, acts, or conduct which are the result of carelessness, negligence, ignorance, or inadvertence may not be used to infer the specific criminal intent because such acts or conduct would negative the existence of the necessary condition of intent itself.

Further, in your consideration of such facts, if any be present in this case, it is essential, before you may infer specific criminal intent from any acts or conduct of the defendant, that such acts or conduct be consistent with the theory of the defendant's guilt, inconsistent with every reasonable theory of the defendant's innocence, and exclude every reasonable doubt of the defendant's guilt.

Therefore, your process of consideration of the element of specific criminal intent on each count should be as follows: First, determine whether or not you can find beyond a reasonable doubt the existence of acts or conduct on the part of the defendant, from which, as circumstantial evidence, you feel you might infer the existence of a specific criminal intent in the defendant to evade or defeat his income tax. If you find no such acts or conduct at this point, you must acquit the defendant without further consideration. Second, if you do so find, then determine whether those acts and conduct are consistent with the theory of defendant's guilt, inconsistent with every reasonable theory of the defendant's innocence, and exclude every reasonable doubt of the defendant's guilt. If you conclude that these three conditions exist as to such facts, then you should find one of the essential factors necessary to determine the defendant's guilt—

the existence of the specific criminal intent. However, if having found such acts or conduct to exist, you do not find that they are consistent with the theory of the defendant's guilt, or if you do not find that they are inconsistent with every reasonable theory of defendant's innocence, or if you do not find that they exclude every reasonable doubt of the defendant's guilt, then or in either of those events, you must acquit the defendant." (10-13)

"And I take final exception to the failure to give Proposed Instruction No. 29 for the reason that the same is, I would say, a relatively short concise statement of the . . . of the situation that was being submitted to the jury and set forth in one instruction and briefly the law which they were required to consider in determining the defendant's guilt or innocence, and contained all of the factors necessary for their consideration as to the intent." (573)

12.

The trial court erred in the admission over objection of Pltf Exh 77, being checks of Lyle Lumber Company made payable to Joe Palermo during the year 1948, in that said checks were improperly and insufficiently identified to be admissible as evidence of payment of income to appellant during the year 1948 (212-216). This Exhibit was used in conjunction with other Exhibits and specifically in the creation of Pltf Exh 91 by appellee in its attempt to prove a pattern of underreporting and thus criminal intent (292-293).

"First of all, with reference to all of the exhibits for

identification recited by Mr. Bantz, and he has now offered, as immaterial; and secondly, with reference to 77 for identification . . . insufficient identification.” (294)

13.

The trial court erred in the admission over objection of Pltf Exh 91, being a summary by the revenue agent Simonson of appellant's 1948 income from specific individuals or companies, the amount thereof recorded in appellant's books, not recorded in appellant's books, deposited in the bank and not deposited in the bank, for the reason that such was based in part upon other evidence improperly admitted, Pltf Exh 77, (292-293); such was prejudicial upon the determination of criminal intent of appellant, being offered for the purpose of showing a pattern of income to create the implication of intent.

“In reference to 91 by reason of its inclusion of the substance of the rest of the exhibits for identification, that the same has not been shown to or even tend to show matters which Mr. Bantz seeks to prove thereby as previously on the other exhibits as stated before.” (294-295)

14.

The trial court erred in the admission over objection of Pltf Exh 78, being checks of Lyle Lumber Company made payable to Joe Palermo during the year 1949, in that said checks were insufficiently and improperly identified to be admissible as evidence of payment of income to

appellant during said year (212-216). This Exhibit was used in conjunction with other Exhibits and specifically in the creation of Pltf Exh 92 (by appellee in its attempt to prove a pattern of underreporting and thus criminal intent (299-301).

“With reference to the offered exhibits for identification, your Honor, our objection goes to 15, 34, 43, 46, 78, 80, 92, on the basis that the same is immaterial, that the same do not have any tendency to prove that which Mr. Bantz claims that they would, and in addition with reference to Exhibit 78 for Identification, insufficient identification.” (302)

15.

The trial court erred in the admission over objection of Pltf Exh 92, being a summary by revenue agent Simonson of appellant's 1949 income from specific individuals or companies, the amount thereof recorded in appellant's books, not recorded in his books, deposited in the bank and not deposited in the bank for the reason that such was based in part upon other evidence improperly admitted, Pltf Exh 78 (299-301); such was prejudicial upon the determination of criminal intent of appellant, being offered for the purpose of showing a pattern of underreporting of income to create the implication of criminal intent.

“ . . . the same is immaterial, that the same do not have any tendency to prove that which Mr. Bantz claims that they would . . . ” (302)

ARGUMENT

SUMMARY OF ARGUMENT

The argument herein as to appellant's request for judgment of acquittal may be summarized upon the basis that there was no evidence presented at the trial independent of underreporting itself to prove or tend to prove the element of criminal intent; that because of this the verdict is not supported by the evidence; that further because of this the trial court should have granted appellant's motion for acquittal; that this Court should now direct a judgment of acquittal of the defendant on all four counts of the indictment.

As to the appellant's alternative request for new trial, appellant was prevented from having a new trial by the improper admission of exhibits to the prejudice of appellant, and by the failure of the trial court to properly instruct the jury in the law of the case; that in the event this Court denies appellant's request for acquittal, appellant should be granted a new trial.

APPELLANT ENTITLED TO JUDGMENT OF ACQUITTAL

Appellant was charged with violation of section 145 (b) of the Internal Revenue Code of 1939 in wilfully and knowingly attempting to evade and defeat income taxes due and owing by appellant and his wife for the calendar

years 1950 to 1953, inclusive. The charge made and proved against appellant was that during the indictment years he had failed to properly report all of his gross income, resulting in an understatement of net income and understatement and underpayment of income taxes. Appellant made no denial of the underreporting and, by reason thereof, the understatement and underpayment of income taxes. Appellant's defense was based upon his statement that he attempted to maintain a record of his gross receipts from the checks given in payment to his books; that because of carelessness, inadvertence, or of negligence, he did not record all income checks in his books; that he made use of his gross income figures from his books in providing information to Bates for the preparation of his income tax returns, he was not aware of such when so providing the information and filing his tax returns, and that therefore he did not "knowingly and wilfully" file the returns with intent to evade his income taxes.

This being a criminal case, appellee was required to prove beyond a reasonable doubt all of the essential elements of the crime charge as to each of the four counts of the indictment. These essential elements are that at the time of filing each income tax return for the years 1950 to 1953, inclusive,

(1) Appellant's return did not include all of his in-

come for the preceding calendar year;

- (2) By reason thereof, appellant's return did not report and appellant did not pay sufficient income tax for such preceding calendar year;
- (3) Appellant knew that the return did not correctly include all of his income and thus that he was not paying all income tax due for the preceding calendar year;
- (4) Appellant filed the return with the specific criminal intent to evade or defeat the income tax due for the preceding calendar year.

For purposes of this argument, and as conceded at the trial, appellant admits that essentials 1 and 2 were proved by appellee beyond any reasonable doubt. However, as to essentials 3 and 4, appellant submits there was no evidence nor inference from the evidence to establish these factors. Inasmuch as the term "criminal intent" in this case would embrace "knowingly and wilfully" attempting to evade income taxes, reference hereinafter to these requirements will be limited to the former phrase.

In proving a case of income tax evasion, the United States must prove beyond a reasonable doubt the existence of the specific criminal intent on the part of the defendant to evade or defeat his income tax through independent evidence, that is, evidence other than the underreporting of income and underpayment of tax.

Holland v. United States, 348 U. S. 121, 99 L. ed, 150;
Spies v. United States, 317 U. S. 492, 87 L. ed. 418;
Morissette v. United States, 342 U. S. 246, 96 L. ed.
 288;

Hargrove v. United States, 5 Cir., 67 F. 2d 820.

The doing of the act (the underreporting of the income and underpayment of the tax) does not establish the existence of the criminal intent.

Holland v. United States, *supra*;

Morissette v. United States, *supra*.

Intent, being a state of mind in which an act is done, can normally be shown only by circumstantial evidence; that is, evidence of conduct on the part of the defendant which justifies the conclusion that an attempt to evade was intended. As stated in *Spies v. United States*, *supra*, "affirmative wilful intent may be inferred from conduct, such as keep a double set of books, making false entries or alterations or false invoices or documents, destruction of sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind and any conduct the likely effect of which would be to mislead or conceal." The foregoing does not include all possible courses of conduct from which criminal intent might be inferred but does indicate the type of proof which should be, and must be, made. And the evidence,

being but circumstantial, should point unerringly to criminal intent.

The judicial declarations of what constitutes sufficient proof of criminal intent are as varied as the cases; however, in general, some guides have been created:

- (a) A consistent pattern of large understatements of income is not alone sufficient to sustain proof of intent, but is a strong circumstance when accompanied by other indicia of wilfulness. *Romm v. Commissioner*, 4 Cir., 245 F. 2d 730;
- (b) The amount of the deficiency and the disparity between income received and reported are not to be considered as evidence of criminal intent. *United States v. Cindrich*, 3 Cir., 241 F. 2d 54.
- (c) In net worth cases wherein the defendant has usually denied even the existence of income, and is without records, the courts have required less evidence of conduct additional to a consistent pattern of underreporting to sustain a finding of criminal intent. *Holland v. United States*, supra.
- (d) At the very least, in cases involving more than one year, the courts have required evidence additional to a consistent pattern of underreporting, such as destruction of records, attempts to conceal income or assets, falsifying of records or invoices, maintaining more than one set of books or records, and similar affirmative conduct. *Spies v. United States*, supra; *United States v. Lindstrom*, 3 Cir., 222 F. 2d 761; *Sasser v. United States*, 5 Cir., 208 F. 2d 535; *Clark v. United States*, 8 Cir., 211 F. 2d 100; *Banks v. United*

States, 8 Cir., 204 F. 2d 666; *United States v. Zimmerman*, 7 Cir., 108 F. 2d 370.

From the negative standpoint, an accused does not have the requisite intent if the facts indicate that his conduct was the result of negligence, carelessness or recklessness; or even if he has acted without a justifiable excuse, or without grounds for believing his conduct to be lawful, or with a careless disregard for whether or not he has the right to so act.

Hargrove v. United States, *supra*;

Spies v. United States, *supra*;

Jones v. United States, 5 Cir., 164 F. 2d 398;

Bloch v. United States, 9 Cir., 221 F. 2d 786;

Garipey v. United States, 6 Cir., 220 F. 2d 252;

Gaunt v. United States, 1 Cir., 184 F. 2d 284.

The foregoing is emphasized for the reason that the trial court denied appellant's motions for acquittal and submitted the case to the jury with no evidence other than underreporting of income for a number of years from which to infer criminal intent. To permit proof of criminal intent solely by proof of repeated acts, relinquishes the necessity of proving criminal intent at all; and further denies the existence of millions of people who daily and yearly, without criminal intent, repeatedly perform similar careless, negligent, and even reckless, acts.

What did appellee prove, circumstantially, as evidence of criminal intent. Nothing more than that during the years 1948 through 1954, appellant at no time correctly recorded and reported his gross income. There was no "consistent pattern" of underreporting. Appellant did not, for example, report income by checks and fail to report income by cash. All income was by check. Appellant did not consistently fail to report all income from one or more sources. Appellant did not consistently fail to report income during any certain period of the year. Appellant did not consistently fail to report small checks and report large checks. He merely failed to record in his books (Pltf Exh 98, 99, 100) all income. then believing his books to contain all gross income, used those figures for preparation of his tax returns by Bates (467-472).

Appellant did not keep a double set of books; rather he maintained a single set of books which he had personally set up but which were not correct (Deft Exh 98, 99, 100). The information which he took from his books and records for use by Bates in preparing his tax returns was incorrect both as to gross income and expenses, even though appellee did not attack the expenses in this action (34, 349-352). Appellant did not make false entries or alterations in his books; his books were incomplete in that they did not show all of his income, but they did not

contain false entries or alterations. Appellant did not make false invoices or documents; nor did he destroy evidence of income, assets, or sources of income. Rather he retained in his possession and without question provided to the revenue agents, not only his books but also his duplicate bank deposit slips, bank statements, and cancelled checks, which showed income sources inadvertently omitted from his books (Deft Exh 108, 109). Upon investigation, he fully cooperated in disclosing his records, his assets, and sources of income (460, 480, 481). Appellant did not handle his affairs in such a manner as to avoid making records usually made by those in his circumstances; he maintained his books, bank statements, cancelled checks, bank deposit slips in a normal manner except for errors. Appellant did not secrete funds in safety deposit boxes or in bank accounts under assumed names; he maintained bank accounts at Stevenson and White Salmon in his own name, in which he deposited practically all of his income (Pltf Exh 86, 87, 88, 89). Although appellee urged at the trial that appellant had attempted to hide the Bank of Stevenson savings account (327-328), by reason of its omission from a net worth trace submitted by appellant's accountant (Pltf Exh 66), the accountant accepted full blame for this omission, and it was demonstrated that some two months earlier, appellant had advised the revenue agent of the existence of funds

in that Bank (337, 338, 480, 481, 418-420).

A reading of the entire record clearly demonstrates that appellant did nothing from which criminal intent might be inferred; that is, there was no evidence, independent of the underreporting itself, of conduct "the likely effect of which would be to mislead or conceal." *Spies v, United States*, supra. Appellant, without formal education beyond the 11th grade of high school, was a wage earner from the time he quit high school in the twenties until he went into business for himself in late 1947 (447-449). Without benefit of advice he attempted to maintain his own books and conduct his own office at home, while at the same time actively running the business of logging in the woods (386, 387, 451, 461-465). It may be foolish conduct in the modern day of governmental regulation to keep an office in a desk at home and be without assistance in the keeping of books and records, but such is not criminal. Appellant's present problems are the direct result of the fact that his main efforts at all times were directed to the active personal operation and management of the business of logging timber in the woods, and did not include the proper establishment of office records.

Appellant's maintenance of records are demonstrated by his books (Deft Exh 98, 99, 100), which, without argu-

ment, are poorly kept. He attempted to keep a record in his books of income checks as they were received, though he did not do so successfully (462-472). His books are as inadequate in reflecting his expenses as in reflecting income, although appellee did not attack this matter in its case. Starting in the latter part of 1947, appellant became a business-man and employer rather than a truck-driver and employee. He became a man with gross income at times exceeding \$100,000.00 per year (Pltf Exh 87, 88, 89), rather than a man whose gross income had averaged for some time around \$4500.00 per year (449). Is it unnatural that he should believe the sum showing on his books as the gross income for a year was the true gross income? Mr. Bates, who made out appellant's tax returns and who averaged 150 returns per year in the White Salmon area, felt that the gross income figures were reasonable (92).

During the four indictment years, appellant received income from 5 sources for two of the years, 7 sources for one year, and 12 sources for one year (Pltf Exh 86, 87, 88, 89). All sources of income were within the White Salmon-Bingen area and all paid by check. In 1950, appellant recorded in his books and reported on \$66,090.94 gross out of a total of \$82,964.64, of which he deposited in his bank account \$80,444.20 (Pltf Exh 3, 86). In 1951, he

recorded and reported on \$98,178.22 gross out of a total of \$120,129.70, of which he deposited \$118,948.79 (Pltf Exh 4, 87). In 1952, he recorded and reported on \$97,952.27 gross out of a total of \$127,410.77, of which he deposited \$125,724.32 (Pltf Exh 5, 88). In 1953, he recorded and reported on \$102,901.73 gross out of a total of \$116,865.89, of which he deposited \$111,886.16 (Pltf Exh 6, 89). He retained in his possession all bank statements showing deposits, cancelled checks written upon bank accounts, and duplicate deposit slips showing sources of income. The depositing of these funds in excess of reported gross income in appellant's home town bank in White Salmon, a town of 1200 to 1500 population, coupled with the retention of deposit slips and bank statements disclosing deposits, balances, and income sources is not "conduct the likely effect of which would be to mislead or conceal."

Appellant made mistakes in failing to include all of his income in his books; however, he made additional mistakes by including in his books, and thus reporting as income, funds which he did not receive as income. One example of this can be found in Pltf Exh 86 and 98 wherein appellant recorded in his books the receipt of two income items from McCormick Lumber Company totalling \$2784.00 in the year 1950, whereas in fact such income was never received from McCormick Lumber. Again, ap-

pellant reported a \$900.00 income item from S. D. S. Lumber Company in 1950 (Pltf Exh 86, 98), whereas all investigation revealed such to be \$148.58, and no more. This is not the conduct of a man having criminal intent to evade taxes. Rather it is the conduct of a poor bookkeeper and a negligent or careless businessman.

In 1953, appellant submitted an application and financial statement to McCoy Insurance Agency in White Salmon, as agents for American Bonding Company, for the purpose of obtaining a timber cutting bond. Included in the financial statement was disclosed an asset of \$50,000.00 in the White Salmon Branch of the National Bank of Commerce; at the time of receiving the application, Mr. Legler, of McCoy Insurance, with appellant's approval, confirmed the amount of the checking account with the Bank (Pltf Exh 31; 106-107). This is most definitely not conduct the likely effect of which would be to mislead or conceal appellant's financial status or income.

Summarizing, the proof of intent introduced at the trial can only be found in the underreporting itself for the indictment years, plus 1948, 1949, and 1954. Any conclusion that criminal intent had been proved beyond a reasonable doubt would thus have to be based upon a factor which the courts have held shall not be considered

as an element of proof of intent. Appellee's method of trying appellant justifies this conclusion. With knowledge of mistakes by appellant in recording and claiming expense items for the indictment years (in fact, appellant's books recorded but a small number of expense items), appellee completely disregarded these mistakes and omissions, and for the sake of the trial, assumed the expense items to be correct (34). Then on final argument to the jury, the U. S. attorney argued that appellant had all of his expenses correctly recorded and substantiated, in an effort to convince the jury that appellant intentionally omitted income while accurately maintaining expense records (548, 549). In addition, appellee throughout the case emphasized and re-emphasized the amount of income omitted from the returns as compared with appellant's net income rather than with his gross income; this, of course, created the impression of greater intentional fault and less chance of negligence or carelessness. For example, in summarizing testimony through the revenue agent Simonson, appellee compares the net income as reported (describing it as adjusted gross income as on an income tax return) at \$4553.00, with the omission of \$16,873.70, making the discrepancy of the omitted funds extremely large in proportion (Pltf Exh 93; 318). In reality, if appellee was accepting appellant's expense items as correct, the comparison should have been one between the

sum of \$82,964.64 received and \$66,090.94 reported gross income (Pltf Exh 86). Appellee also placed great emphasis upon the number of checks received as compared with the number of checks omitted from the books (Pltf Exh 86, 87, 88, 89; 550). This method of proof of criminal intent, despite the trial court's ruling, is not proof by independent evidence. It is nothing more than a conclusion and argument based upon the underreporting itself. Appellant underreported income by failing to include all of his gross income in his books. This is made more specific and proved at the trial by placing in evidence all records of monies paid unto appellant by check. A summary of the number of checks received and reported, or a comparison of the funds received and reported is still only evidence of the underreporting. It cannot be reduced to mathematical calculations, then twisted into a statistical proof of criminal intent merely by calling it independent evidence. Our courts have repeatedly ruled that the doing of the act can not in itself be considered as proof of criminal intent where such intent is an essential to the crime. *Morissette v. United States*, supra. Yet in the instant case, appellee not only sought but accomplished the conviction of appellant on nothing more than proof of the act coupled with statistical reviews of the mathematical figures which proved the act.

Error is hereby predicated upon the failure of the trial court to grant appellant's motions for acquittal (15-16, 515), and upon the failure of the trial court to give appellant's requested Instruction No. 1, directing a verdict of "Not Guilty" as to all four counts of the indictment (7). Appellant excepted to the failure to give such instruction (567-568). Additionally appellant submits that the verdict of the jury is not supported by the evidence (15). By reason of any of the preceding matters, it is submitted that the verdict and judgment should be set aside and a judgment of acquittal entered as to all four indictment counts.

Concerning the failure of the trial court to grant appellant's motions for acquittal, in each instance (16-20, 365-367, 515), appellant drew the court's attention to *Elwert v. United States*, 9 Cir., 231 F. 2d 928, 933, and the rule therein set forth that "the trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only, if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence." The trial judge refused to recognize the validity of this rule (16-20, 365-367, 515). This rule has not only been established in the foregoing case but also in:

Lattanzio v. United States, 9 Cir., 243 F. 2d 201;

Remmer v. United States, 9 Cir., 205 F. 2d 277;
Charles v. United States, 9 Cir., 215 F. 2d 831;
Bateman v. United States, 9 Cir., 212 F. 2d 61;
Schino v. United States, 9 Cir., 209 F. 2d 67;
Stoppelli v. United States, 9 Cir., 183 F. 2d 391;
State v. Charley, 48 Wn. 2d 126, 291 P. 2d 673.

A review of the evidence as set forth hereinabove establishes without question that appellee failed to prove the element of criminal intent because there was no showing of any conduct, by circumstantial evidence or otherwise, from which criminal intent might be inferred. Thus, reasonable minds as triers of fact must agree that reasonable hypothesis other than guilt could be drawn from the evidence, and judgment of acquittal should be entered at this time as to all four counts of the indictment.

With reference to appellant's claim that the verdict is not supported by the evidence, the test to be applied is set forth in *Vick v. United States*, 5 Cir., 216 F. 2d 228, 232 (approved in *Lattanzio v. United States*, *supra*:

"In circumstantial evidence cases, this Court has said repeatedly that to sustain conviction the inferences reasonably to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of his innocence. . . . In such cases, the test to be applied on motion for judgment of acquittal and on review of the denial of such motion is not simply whether in the opinion of

the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude."

Again, viewing all of the evidence herein, it is submitted that the jury might reasonably so conclude, following the rules herein set forth.

One final statement is now submitted by appellant in the desire to emphasize that the rules to be applied in net worth cases are somewhat different than in the instant case. In this case, the only issue was whether or not appellant "knowingly and wilfully" attempted tax evasion, and proof thereof was sought by appellee through circumstantial evidence. In a net worth case, a defendant normally has denied all phases of the crime, including underreporting or receipt of income, requiring the government to prove all of the elements of the crime by circumstantial evidence. The effect of the proof of income received, or the disparity between income reported and income received is of greater weight in establishing intent in a net worth case than in a case of the type herein being considered. This has been recognized in *United States v. Cindrich*, 3 Cir., 241 F. 2d 54, 57:

"The amount of deficiency is not a consideration on the question of the guilty knowledge or intent element of the crime, although it may be an important

element where the deficiency itself is an issue, as in a net worth prosecution.”

Appellant urges that this difference be given great consideration by this Court in determining appellant’s request for acquittal. This was not a net worth case; appellant openly admitted at the trial an understatement; knowing criminal intent became the sole issue, to be proved by circumstantial evidence. Under these circumstances, the underreporting of income, the disparity between income received and income reported, the disparity between checks received and checks reported should not be considered as indicating proof of specific criminal intent. And without the use of such factors there is no independent evidence whatsoever, nor any inference therefrom, on which specific criminal intent may be founded.

This Court should direct an acquittal of appellant on all four counts of the indictment.

APPELLANT ENTITLED TO NEW TRIAL

Appellant is entitled to a new trial, in the event judgment of acquittal be denied, by reason of the refusal of the trial court to properly instruct the jury and by reason of error in the admission of documentary evidence.

A. Failure of the trial court to properly instruct.

This action was tried with the only basic issue for determination being that of knowing criminal intent on

the part of the appellant, appellee seeking proof by circumstantial evidence. Appellant's defense was lack of knowing criminal intent, demonstrated by direct evidence through specific denial and by circumstantial evidence indicating that appellant was either negligent, careless, reckless, or acted with a careless disregard for whether or not that which he did was correct.

The instructions of the court (552-567) consisted of a recitation of the charge (554), the presumption of innocence (556), a definition of reasonable doubt (556-557), the elements of the crime (557), a definition of wilful attempt (558) and its application (558-559), a reference to use of evidence of underreporting for 1948, 1949, and 1954 (559), a reference to direct evidence as distinct from circumstantial evidence (562), the effect of character evidence (563), and the use to which the revenue agent's summaries might be put (563-564). It is appellant's contention that the definition of reasonable doubt was insufficient, thereby requiring the "circumstantial evidence rule" as set forth in appellant's proposed Instructions No. 9, 11, 12, and 29 (7-13); that said rule was further required by reason of the inadequate reference to the direct evidence as distinct from circumstantial evidence (562). It is further appellant's contention that proposed Instructions No. 16, 20, 21, 24, and 29, (9-13) should have been

given for the reason that the instructions of the court did not fully instruct the jury as to appellant's defense, and that the court's instructions advised the jury of the use of evidence against appellant but omitted advice as to the use of evidence in favor of appellant. Appellant further submits that the instructions of the court did not properly define circumstantial evidence (562) as did proposed Instruction No. 12 (8). The court's instructions contained no direction that no presumption of guilt might be drawn from the act of underreporting (proposed Instruction No. 16; 9; proposed Instruction No. 29; 11).

1. Proposed Instruction No. 9

Under the evidence presented at the trial, the question for determination was the existence of knowing criminal intent. Any evidence presented was circumstantial only, and in the eyes of the jury could have been as consistent with innocence as with guilt. Proposed Instruction No. 9 (8) advised the jury that if the evidence could be reconciled either with the theory of innocence or guilt, they were required to adopt the theory of innocence. The court's instructions at no point so advised the jury. A similar but much stronger instruction was approved in *United States v. Schanerman*, 3 Cir., 150 Fed. 2d 941. By reason of the failure of the court to so instruct, appellant was denied the right to have the jury consider the evidence

from this standpoint, on which they might well have determined appellant's innocence.

2. Proposed Instruction No. 11

This proposed instruction (8) directed the jury to consider the evidence in the same manner as appellant requested the trial court's consideration in the motions for acquittal; that is, the jury would be directed to return a verdict of not guilty unless there be substantial evidence of facts which excludes every reasonable hypothesis but that of guilt, and if all substantial evidence be as consistent with innocence as with guilt.

This rule is applicable in considering a motion for acquittal.

Smith v. United States, 9 Cir., 233 F. 2d 744;

United States v. Elwert, supra;

Lattanzio v. United States, supra.

Described as the "circumstantial evidence" rule by the United States Supreme Court, it was held not required in that case so long as the trial judge properly instructs on reasonable doubt.

Holland v. United States, supra.

However, in the absence of other proper instructions, the refusal to charge that circumstantial evidence must

exclude every reasonable hypothesis other than guilt to support a conviction is error.

Anderson v. United States, 5 Cir., 30 F. 2d 485;

See also: *United States v. Gasomiser, Corp.*, 7 F. R. D. 712; and *Perkins v. United States*, 9 Cir., 237 F. 2d 857.

Here the trial court did not fully instruct on reasonable doubt, and instructed as to inferences favorable to appellee without instructing as to inferences favorable to appellant. Considering the entire instructions of the court, the failure to give proposed Instruction No. 11, embodying the "circumstantial evidence" rule, prevented the jury from properly determining the main issue of the case—knowing criminal intent. It is submitted that such instruction was necessary and would have altered the jury's verdict.

3. Proposed Instruction No. 12

The trial court instructed the jury solely that there were two types of evidence, direct and circumstantial (562), without fully instructing the jury as to the nature of circumstantial evidence and the essentials required to be present in order to convict on circumstantial evidence. The entire case of appellee and appellant was founded on circumstantial evidence. It was imperative that the jury be instructed in accordance with Instruction No. 12 (8) for the protection of appellant's rights. The defini-

tion provided by the trial court of circumstantial evidence was improper and incomplete, a fault cured by the proposed instruction. Because the court's instruction on reasonable doubt was insufficient in informing the jury of their duty in adapting the instruction to the question of criminal intent, and spoke only of reasonable doubt in general terminology, the jury was unable to understand the nature of circumstantial evidence and its application to the basic issue of the case. The proposed instruction would have so informed the jury.

4. Proposed Instruction No. 16

This instruction advised the jury that a distinction exists between the filing of a false return and the filing of a false return with intent to evade taxes; and further than no presumption of guilt might be drawn from the act itself (9). No such instruction was given by the trial court either in the same or similar wording.

That a distinction as above set forth does exist is without question. The rule that no presumption of guilt may be drawn from the act stems originally from *Morissette v. United States*, *supra*, and has been applied in tax evasion cases as well.

Lurding v. United States, 6 Cir., 179 F. 2d 419;

Spies v. United States, *supra*;

Vloutis v. United States, 5 Cir., 219 F. 2d 782.

In this case, appellant admitted the underreporting of income. The issue then became whether he had filed the incorrect income tax with knowledge and intent to evade taxes. In the absence of an instruction such as No. 16, the jury would be justified in concluding guilt from the act alone. The Court has a duty to at all times make the issues clear to the jury and explain inferences that can be drawn both for and against the accused.

Bernstein v. United States, 5 Cir., 234 F. 2d 475;
Holland v. United States, *supra*.

The failure of the court to give Instruction No. 16 did not explain inferences rightfully to be drawn in favor of appellant, and thus prevented a proper consideration of the evidence by the jury.

5. Proposed Instruction No. 20

The trial judge instructed the jury that "even gross carelessness, recklessness or negligence in the *preparation* of an income tax return, or honest errors of fact or law, is not fraud" (559). Such was misleading to the jury in view of the fact that the instruction relates to "preparation" of the tax return, and the evidence clearly showed that Mr. Bates prepared appellant's tax returns (78-79). The attempt of the trial court to clarify for the jury the appellant's rights in relation to carelessness, negligence, or recklessness thus resulted in confusing the jury. Appel-

lant's proposed Instruction No. 20 (9) properly directed the jury's attention to the acts of the appellant as they might be considered negligent, careless, reckless, etc.; the restriction to "preparation" did not coincide with the evidence presented in the case. Appellant's carelessness, negligence, or recklessness might well have been in the recording of gross income in his books, in the maintenance of records generally, in not checking his books with those from whom he received income to obtain his true gross income, in using incorrect information for delivery to Bates, or even in finally signing and mailing his tax returns with a reckless disregard as to whether or not it was correct.

A criminal defendant is entitled to have instructions presented relative to any theory of defense for which there is any foundation in evidence, no matter how weak or incredible that evidence may be.

United States v. O'Connor, 2 Cir., 237 F. 2d 466;

United States v. Indian Trailer Corp., 7 Cir., 226 F. 2d 595;

Tatum v. United States, 190 F. 2d 612, 88 U. S. App. D. C. 386;

Smith v. United States, 6 Cir., 230 F. 2d 935.

Appellant submits that the instructions as given by the court were incomplete and insufficient upon the points

of law which proposed Instruction No. 20 covers; that such insufficiency denied appellant the right to have the jury consider all of the factors relating to "knowing criminal intent" as established by the evidence and on which appellant relied as a defense.

6. Proposed Instruction No. 21

This instruction (9-10) is similar to proposed Instruction No. 20 in presenting to the jury matters of defense on which the trial court failed to instruct, and appellant adopts the same argument set forth with reference to the failure to give proposed Instruction No. 20.

Additionally, the trial court at no time instructed the jury that the criminal intent necessary to sustain a conviction of appellant had to be the specific intent to defeat or evade income taxes, as required in *Holland v. United States*, supra, and *Bernstein v. United States*, supra. Specific criminal intent to evade income taxes was the only major issue in this case, and it was incumbent upon the trial court to specify clearly the requisites for conviction, rather than rely upon a general discussion of reasonable doubt. The lack of specific criminal intent was a matter of appellant's defense, on which there was some basis in the evidence; the jury might have concluded, if properly instructed, that appellant acted without justifiable excuse, or without grounds for believing his return to be lawful,

or with a careless disregard for whether or not he had a right to act as he did. Under the instructions as given, appellant may well have been convicted upon such a jury finding, which would result in acquittal if Instruction No. 21 were given.

7. Proposed Instruction No. 24

This instruction (10) is taken directly from *Gaunt v. United States*, supra, and was approved in *Bernstein v. United States*, supra. The instructions of the court (558) did not fully advise the jury as to the meaning of "wilful," and failed to correlate the term with the evidence in order to inform the jury as to what situations as presented by the evidence might be considered as negating "wilful attempt." Instead, the court limited its reference to carelessness in the "preparation" of the return, and provided appellee greater benefit by referring specifically to evidence of underreporting in 1948, 1949 and 1954 as being available for determination of criminal intent. Thus, the court failed to present evidence relative to any theory of defense for which there was foundation in the evidence, as required.

United States v. O'Connor, supra;

United States v. Indian Trailer Corp., supra;

Tatum v. United States, supra;

Smith v. United States, supra.

Further, the court did not anywhere instruct as to inferences which might be drawn from the evidence in appellant's favor, though instructing as to inferences which might be drawn from the evidence in appellee's favor, as above noted.

Although referring to the necessities in a net worth case, the United States Supreme Court supported appellant's view in *Holland v. United States*, at 129:

"Charges should be especially clear, including in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused."

See also *Bloch v. United States*, 9 Cir., 223 F. 2d 297.

By reason of the insufficiencies of the instructions as given by the court, and the refusal of the court to give proposed Instruction No. 24, appellant was deprived of the right to have the jury informed of the factors in evidence from which they might infer a lack of criminal intent.

8. Proposed Instruction No. 29

This instruction (10-13) constitutes a relatively concise statement of the law applicable to the instant case under the evidence presented at the trial concerning the basic issue of knowing criminal intent. The instructions

of the court (552-567) were incomplete and improper as set forth in Paragraph A above. There was a failure to properly instruct on reasonable doubt, circumstantial evidence, appellant's defenses, the "circumstantial evidence" rule, the lack of presumption of intent from the commission of the act itself, and the inferences to be drawn in appellant's favor from the evidence. This instruction did so fully, simply, and without confusion.

B. Erroneous Admission of Evidence

Appellant's claim of error in this respect is directed to the admission of four exhibits over appellant's objections, which exhibits were introduced for the purpose of proving underreporting in the years 1948 and 1949 in order that appellee might claim circumstantial proof of criminal intent through the establishment of a "consistent pattern of underreporting of income."

Pltf Exh 77 consisted of checks of Lyle Lumber Company made payable to Joe Palermo during the year 1948 and Pltf Exh 78 consisted of checks of the same company made payable to appellant during the year 1949. Identification was made by Everett Thoren, one of the owners of Thoren Lumber Company of Lyle, Washington, which Company had acquired the assets of Lyle Lumber Company in 1953 (212-216). Mr. Thoren testified that he received the books and records of Lyle Lumber Company

and included therein were the checks in these two Exhibits. He did not know anything about the checks or other records except that he had found them in a box. These checks were "apparently log checks." Over appellant's objections that there was insufficient identification, the trial court admitted both Exhibits (294, 296, 302).

Applicable hereto is 28 U. S. C. section 1732 (a):

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry on a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

In *N. L. R. B. v. Sharples Chemicals, Inc.*, 6 Cir., 209 F. 2d 645, it was held that the existence of a document or its presence in the file of a corporation does not, without more, render it admissible. In *Masterson v. Pennsylvania R. Co.*, 3 Cir., 182 F. 2d 792, it was held that a writing was not admissible merely because it may appear on its face to be a writing made by a physician in regular course of his practice.

Thus, it is submitted that the mere fact that Mr.

Thoren found some checks in a box when he took over Lyle Lumber Co. and that the checks are made payable to appellant neither make these checks admissible in evidence, without further identification, nor act as proof of payment to appellant of income during the years 1948 and 1949.

After this alleged identification of Exhibits 77 and 78, appellee offered in evidence Pltf Exh 91 and 92, being summaries for the years 1948 and 1949, respectively, created by the revenue agent Simonson from other exhibits; 91 was created in part from 77 and 92 in part from 78 (292-294, 299, 300). These summaries purported to set forth appellant's gross income as recorded in his books, as reported on his tax returns, and as actually received by appellant for the years 1948 and 1949. Each was admitted over the objection of appellant (294, 297, 302).

In *Hartzog v. United States*, 4 Cir., 217 F. 2d 706, an income tax evasion conviction was set aside because of the admission of work sheets prepared by a government agent which were based on other inadmissible work sheets.

Appellant submits that the admission of these four exhibits constituted reversible error because of their use by appellee in argument and the trial court in its instructions as evidence of a pattern of underreporting to prove knowing criminal intent; that coupled with the erroneous

instructions of the trial court (resulting from the refusal to give appellant's proposed instructions), the jury was permitted to make improper use of the exhibits in arriving at the verdicts of guilty.

CONCLUSION

With reference to appellant's request for judgment of acquittal, it is submitted that the same should now be granted for the reason that, as a matter of law, there was no evidence nor inference from the evidence on which a finding of knowing criminal intent can be based.

With reference to appellant's request for a new trial, it is submitted that appellant was subjected to prejudicial error in the admission of Pltf Exh 77, 78, 91, and 92; and that the failure of the trial court to submit appellant's proposed instructions permitted the conviction of appellant upon erroneous instructions of the law to the jury. As stated in *Morissette v. United States*, supra:

"Had the jury convicted on proper instructions, it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges."

Respectfully submitted,

JOHN S. MOORE
E. F. VELIKANJE

Attorneys for Appellant

APPENDIX

Table of Exhibits in Record

Exhibit No.	Identified	Offered	Received
1	43	45	295
2	43	45, 246	246
3	43	45	45
4	44	45	45
5	44	45	45
6	44	45	45
10	53	55	55
11	53	55	55
12	54	55	55
13	54	55	55
14	60	295	295
15	60	301	302
16	60	62	63
17	61	62	63
18	61	62	63
19	61	62	63
19-A	111	111	111
20	63	63	64
21	63	63	64
22	64	66	66, 297
23	65	66	66
25	67	315	316
26	71, 81, 238	239, 245	245
27	72, 81, 230	233	233
28	72, 232	233	233
29	72, 82, 234	234	234
30	73, 83, 236	236	237
31	99, 104	106	106
33	174	293	297
34	175	301	302
35	126	127	127
36	127, 128	128	128
37	129	130	130
38	130, 131	131	131

APPENDIX (Cont.)

Exhibit No.	Identified	Offered	Received
39	135	137	137
40	135, 136	137	137
42	141, 142	296	297
43	142	301	302
44	142	143	143
45	143	143	143
46	146	301	302
47	146	149	149
48	147	149	149
49	147	149	149
51	153	154	154
52	156	158	159
53	157	158	159
55	164	164	164
56	164, 165	165	165
57-A	169	170	170
58	177	178	178
59	179	179	179
60	177	178	178
61	183	184, 185	185
62	183	184, 185	185
63	183	184, 185	185
64	183, 184	184, 185	185
65	184	184, 185	185
66	185	187	188
67	185, 186	187	188
68	186	187	188
69	187	187	188
70	188	246	246
71	188	189	189
72	189	189	189
73	189	189	189
74	189	189	189
75	209	211	211
76	210	211	211
77	213	293	297

APPENDIX (Cont.)

Exhibit No.	Identified	Offered	Received
78	214	301	302
80	218	301	302
81	219	220	220
82	220	220	220
83	221	222	221
84	221	222	222
85	227	297	297
86	260	260	287
87	262-268	268	287
88	269, 278	278	287
89	278, 285	285	288
90	290	291	291
91	293	293	297
92	300	301	302
93	318	318	319
94	319, 320	320	320
95	320, 321	321	321
96	321, 322	322	323
98	424, 461	462	462
99	424, 461	462	462
100	424, 461	462	462
101	426	426	426
104	454	455	455
105	454	455	455
106	457	457	457
107	458	458	458
108	458	458	460
109	458	458	461

No. 15810

United States
Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL UNION No. 12, AFL-
CIO,
Respondent.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

MAR 20 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For the Respondent.

DECISION AND ORDER

On November 6, 1956, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief supporting the Trial Examiner. On May 2, 1957, the Board heard oral argument; the General Counsel and the Respondent participated.¹

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.

We agree with the Trial Examiner, for the reasons stated in *Curtis Bros.*, 119 NLRB No. 33, that the Respondent Union, by picketing for recognition as the exclusive bargaining representative of the

¹This case was consolidated for purposes of oral argument, with the *Curtis Brothers* case, 5-CB-190. The changing parties, although served with notice of the oral argument, failed to appear.

employees of Shepherd Machinery Company and of Brown-Bevis Industrial Equipment Company when it did not represent a majority of the employees of either company, violated Section 8(b)(1)(A) of the Act.²

Order

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from restraining or coercing employees of Shepherd Machinery Company or of Brown-Bevis Industrial Equipment Company in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

- (a) Post in conspicuous places in the Respondent Union's business offices, meeting halls, and all

²The fact that the picketing in both instances was for a union shop, in addition to recognition, neither adds nor detracts from the violation. See International Association of Machinists, Lodge 942, AFL-CIO (Alloy Manufacturing Company, 119 NLRB No. 38). As the complaint herein did not allege a violation of Section 8(b)(2) as to this aspect of the Respondent's picketing, we make no finding in that respect.

places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix."³ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by official representatives of the Respondent Union, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of the notice attached hereto marked "Appendix" to the Regional Director for the Twenty-first Region for posting, Shepherd and Brown-Bevis willing, at all locations where notices to the Companies' employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by authorized representatives of the Respondent, be forthwith returned to the Regional Director for such posting.

(c) Notify the Regional Director for the Twenty-first Region in writing, within ten (10)

³In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

days from the date of this Order, as to the steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., November 4, 1957.

BOYD LEEDOM,

Chairman;

PHILIP RAY RODGERS,

Member;

STEPHEN S. BEAN,

Member;

JOSEPH ALTON JENKINS,

Member,

[Seal]

NATIONAL LABOR RELATIONS BOARD.

Abe Murdock, Member, dissenting:

For the reasons stated in my dissenting opinion in the Curtis Brothers case, I dissent in this case.

Dated, Washington, D. C., November 4, 1957.

ABE MURDOCK,

Member,

NATIONAL LABOR RELATIONS BOARD.

Appendix

Notice

To All Members of International Union of Operating Engineers, Local Union No. 12, AFL-CIO

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We Will Not restrain or coerce the employees of Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company, or of Charles E. Skidmore and Milton E. Schwartz, d/b/a Brown-Bevis Industrial Equipment Co., in the exercise of the rights guaranteed in Section 7 of the Act, including the right to refrain from engaging in any or all of the activities guaranteed thereunder.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL UNION No. 12, AFL-
CIO.

(Labor Organization.)

Dated.....

By

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Statement of the Case

Upon a charge duly filed on April 18, 1956,¹ by Mrs. Edwin Selvin, herein called Selvin (being Case No. 21-CC-229), and upon a charge duly filed on May 15, by Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company, herein called Shepherd² (being Case No. 21-CB-805), the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel³ and the Board, by the Regional Director of the Twenty-first Region (Los Angeles, California), issued his consolidated complaint on July 9⁴ against International Union of Operating Engineers, Local Union No. 12, AFL-CIO, herein called Local 12, and on occasions called Respondent, alleging that Local 12 had engaged in, and was engaging in, unfair labor practices affecting commerce, within the meaning of Section 8(b)(1)(A)

¹Unless otherwise noted all dates refer to 1956.

²Conjointly Selvin and Shepherd are herein called the charging parties.

³This term specifically includes counsel for the General Counsel appearing at the hearing.

⁴On the same day, the aforesaid Regional Director, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 6, as amended, issued an order consolidating the above-numbered cases.

and Section 2(6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

Copies of the consolidated complaint, the charges, order of consolidation, and notice of hearing thereon, were duly served upon Local 12, Selvin, and Shepherd.

Specifically, the consolidated complaint alleged that Local 12 lost the Board-conducted election held on May 4, among the employees of Shepherd in the unit found by the Board to be appropriate for the purposes of collective bargaining; that on January 24, Local 12 lost the Board-conducted election held among the employees of Charles E. Skidmore and M. E. Schwartz, d/b/a Brown-Bevis Industrial Equipment Co., herein called Brown-Bevis, in the unit found by the Board to be appropriate for the purposes of collective bargaining; that since February 1, Local 12 has picketed at and near Brown-Bevis' plant and since May 14, has picketed at and near Shepherd's plant for the purpose of causing, forcing, or requiring Shepherd and Brown-Bevis to recognize and deal with Local 12 as the exclusive collective bargaining representative of Shepherd's and Brown-Bevis' employees despite the fact that Local 12 never has been designated nor selected as such representative by the employees of Shepherd or of Brown-Bevis; and that the afore-said picketing by Local 12 is violative of Section 8 (b)(1)(A) of the Act.

Local 12 duly filed an answer denying the commission of the unfair labor practices alleged.

Pursuant to due notice, a hearing was held on August 6 and 7, at Los Angeles, California, before the undersigned, the duly designated Trial Examiner. The General Counsel and Local 12 were represented by counsel. Selvin represented the Charging Parties. Full opportunity was afforded all parties to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to file briefs on or before August 28.⁵ At the conclusion of the taking of the evidence, Respondent's counsel moved to dismiss the complaint for failure of proof and on further ground that the Board lacked jurisdiction over the parties. Decision thereon was reserved. The motion is hereby denied. Briefs have been received from the General Counsel and from counsel for Local 12 which have been carefully considered.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business Operations of the Employers Here Involved

Shepherd Machinery Company, a partnership consisting of Willard W. and Norma D. Shepherd,

⁵At the request of counsel the time was extended to October 1.

has its principal place of business and offices at Los Angeles, California, where it is engaged in the sale and service of construction and farm equipment. Its annual out-of-state purchases exceed \$1,000,000 and its annual out-of-state sales amount to more than \$100,000.

Brown-Bevis Industrial Equipment Co., a partnership consisting of Charles E. Skidmore and M. E. Schwartz, has its principal plant and offices at Los Angeles, California, where it is engaged in the sale and distribution of heavy duty industrial and earth moving equipment. Its annual out-of-state purchases exceed \$1,000,000 and its annual out-of-state sales amount to more than \$50,000.

Upon the entire record in the case, the undersigned finds that, during all times material herein, Shepherd and Brown-Bevis have been, and still are, engaged in commerce within the meaning of the Act.⁶

II. The Organization Involved

International Union of Operating Engineers, Local Union No. 12, AFL-CIO, is a labor organization admitting to membership employees of Shepherd and of Brown-Bevis.

⁶See *Shepherd Machinery Company*, 115 NLRB No. 9 and 115 NLRB No. 107; *Casey-Metcalf Machinery Co., et al.*, 114 NLRB No. 229.

III. The Unfair Labor Practices

A. The Pertinent Facts⁷

1. Respondent's Activities at Shepherd.

On August 20, 1947, the Board in Case No. 21-R-3919 (74 NLRB 1284) certified Local 12 as the exclusive representative of Shepherd's employees in a

⁷Much of the evidence relates to events occurring more than 6 months before the filing of the charges herein and the service of copies thereof. Said evidence was received, not as a basis for any findings of unfair labor practices, but solely for such effect it might have in elucidating, evaluating, and explaining the character and quality of Respondent's alleged illegal conduct after the cut-off dates. It is well settled that Section 10(b) of the Act allows consideration of related acts transpiring prior to the statutory limitation date for the purpose of throwing light on the specific conduct within the period in issue. *NLRB v. Clausen, etc.*, 188 F. 2d 439 (C.A. 3); *NLRB v. General Shoe Corp.*, 192 F. 2d 504 (C.A. 6); *Superior Engraving Co. v. NLRB*, 183 F. 2d 783 (C.A. 7); *NLRB v. White Construction & Engineering Company, Inc.*, 204 F. 2d 950 (C.A. 5); *NLRB v. Ozark Dam Constructors*, 203 F. 2d 139 (C.A. 8); *Banner Die Fixture Co.*, 109 NLRB 1401; *Florida Telephone Corporation*, 88 NLRB 1429; *Sun Oil Company*, 89 NLRB 833. It is also well settled that to prove Respondent had engaged in unfair labor practices it must be shown that the acts and conduct relied upon occurred within the 6-month period or extended into said period. *Joanna Cotton Mills Co. v. NLRB*, 176 F. 2d 749 (C.A. 4); *Stewart-Warner v. NLRB*, 194 F. 2d 207 (C.A. 4); *Superior Engraving Co. v. NLRB*, *supra*; *Universal Oil Products Company, Inc.*, 108 NLRB 68.

certain appropriate unit. However, no collective bargaining contract was entered into.

In 1955, Local 12 and Shepherd had several conferences wherein the former sought to obtain, without a Board-conducted election, a union shop contract covering Shepherd's employees. Shepherd refused to bow to the demands of Local 12, maintaining that before it would enter into any agreement Local 12 would have to be certified by the Board.

At the last of the 1955 meetings, which took place in the latter part of April, Shepherd stated that under no circumstances would it enter into any union shop contract with Local 12 unless the employees to be covered by it had voted in favor of such a provision.

On May 23, 1955, Local 12 placed a picket line at the entrances to Shepherd's Los Angeles establishment.⁸ The signs carried by the picketeers bore the name of not only Local 12 but also of Teamsters Union Local No. 495.

Pursuant to a petition filed by Shepherd, the Board issued a Decision and Direction of Election (Case No. 21-RM-380) directing that an election be held among Shepherd's employees in the unit found by the Board to be appropriate. Said election was held on May 4, 1956, and of the 138 valid votes cast,

⁸Shepherd maintains branches at Santa Ana, San Diego, and Lancaster, California. For a brief period of time the Santa Ana establishment, in addition to the Los Angeles one, was picketed by Local 12.

Local 12 received but 45. On May 14, the Regional Director, under whose auspices the election was conducted, issued a certificate to the effect that no labor organization had been selected as the bargaining representative of the employees involved.

Despite the results of the aforementioned election, Local 12 continued its picketing activities, which it had started the previous May, at the Los Angeles premises of Shepherd.

The credible testimony of Willard W. Shepherd, a Shepherd partner, and of Don C. Montgomery, Shepherd's assistant general manager, clearly discloses that at no time since early 1955 did Local 12 recede from its demand that Shepherd recognize and deal with it as the exclusive collective bargaining representative of the latter's employees and that Shepherd execute a contract containing a union shop provision despite the fact that Local 12 well knew that it did not represent the majority of Shepherd employees. This finding is buttressed by: (1) On April 8, 1955, after Local 12 had demanded that Shepherd discuss a contract covering certain Shepherd employees, the latter filed a representation petition to determine the former's majority status (21-RM-347). Three days later, Local 12 filed a disclaimer of interest with the Board and, on April 15, 1955, the Regional Director dismissed the petition; (2) On May 11, 1955, Local 12, together with Teamsters Local 495, wrote Shepherd requesting a meeting "to conclude a work-

able agreement." On May 11, 1955, Shepherd filed a representation petition (Case No. 21-RM-350). The two unions immediately filed disclaimers of interest. In the face of these disclaimers, Shepherd, on May 20, 1955, requested permission to withdraw its petition, and this request was granted by the Regional Director on June 15, 1955; (3) On December 5, 1955, Shepherd filed another representation petition (Case 21-RM-380), presumably because Local 12 was still picketing its Los Angeles establishment, and 2 days later Local 12 filed a disclaimer of interest. The Board (115 NLRB No. 107), after refusing to give credence to the disclaimer because of Local 12's inconsistent conduct of demanding recognition and at the same time picketing Shepherd, directed that an election be held among certain of Shepherd's employees. This election, which took place on May 4, 1956, Local 12 lost by a vote of 93 to 45; (4) On August 2, 1956, four days before the opening of the hearing in the instant proceeding, Alton H. Silcock, a business representative and the person in charge of the picketing as Shepherd's Los Angeles establishment,⁹ called upon Montgomery purportedly for the sole purpose of serving a subpoena upon him to appear and testify as a Local 12 witness in the instant proceeding. However, Silcock

⁹The picketing which commenced on May 23, 1955, was still going on at the time of the hearing herein, except for about 10 days during October, 1955. The name of Teamsters Local 495, however, did not appear on the picket signs after the May 4, 1956, election.

made no mention of the subpoena nor did he attempt to serve it until he and Montgomery had conversed for about 45 minutes. Regarding this conversation, Montgomery credibly testified as follows:¹⁰

He (Silcock) came into the office and after we greeted each other, we sat down and talked about generalities for a minute or two.

Then he suggested that we should execute an agreement now and solve all our differences, I think. One of his phrases was, "Get on the same train."

I asked him as to the nature of an agreement that might be executed. I told him we had discussed agreements at previous times with Mr. Bronson¹¹

¹⁰In the light of the undersigned's observation of the conduct and deportment at the hearing of Montgomery and Silcock, and after a very careful scrutiny of the record, all of which has been carefully read, and parts of which have been reread and rechecked several times, and being mindful of the contentions of the parties with respect to the importance which each has placed upon the credibility problems here involved, of the fact that in many instances testimony was given about events which took place many months prior to the opening of the hearing, and of the fact that very strong feelings have been generated by the circumstances in this case, the undersigned does not credit Silcock's version of what transpired at the meeting he had with Montgomery on August 2.

¹¹Business Manager of Local 12, and the person who is virtually in charge of all contract negotiations.

and with Mr. Seymour;¹² and we discussed the possibility of a union shop and the possibility of whether or not our employees who did not want to join, would have to join; and he told me that he felt we could sit down and negotiate a union shop at this time without any problems and that those very few who had previously suggested that they did not want to join the union at any time for any reason would probably come along with such an agreement.

He said that all they were concerned with at the present time as Operating Engineers would be the men in our shop; that the other men who voted in the election were extraneous to their particular craft, and therefore, he was talking only about the men in the shop, and wanted an agreement only for them; and he said that we should not continue to disagree and said that a union contract would be the only way for us to get rid of the picket line.

He said that we should sit down, if I remember his words, "Let's sit down, cut a few corners, you and I and Mr. Shepherd can readily negotiate an agreement."

* * *

I explained to him that I felt that we could not execute an agreement based upon the results of the election that had just been held, and he said, "Well, I don't think you should have negotiated an agreement 30 minutes after an election or even 30 days," but he said, "now we can."

¹²A representative of Local 12.

And I told him that our advice had been that we still could not, based upon the fact that our employees had rejected the union as their representative.

So, he said, "Well, I am not sure * * * I have no legal knowledge * * * Let me call my office."

So he placed a call and talked to a chap who from my memory he called "Mac,"¹³ and after [he] talked to "Mac," he said, "Well, they tell me there is no reason in the world why you couldn't execute an agreement right now." He said, "You would first have to dispense with the unfair labor charge pending [in the instant proceeding] then you could immediately negotiate a contract."

Montgomery further credibly testified that when he reiterated that he would follow his counsel's advice and not negotiate a contract "at this time," Silcock remarked,

"Your business would be much better if you did * * * As a matter of fact * * * I have been wanting to buy a blade to put my son in business, but * * * I won't do it with a picket line in effect, and I know a lot of other contractors that feel the same way."

Local 12 contended at the hearing and in its brief that Silcock had no authority to ask [Shepherd] "for any agreement of any kind" and therefore his remarks to Montgomery on August 2, regarding a contract cannot be attributed to Local 12. This

¹³Harold M. McNeel, Local 12's assistant business manager, treasurer, and director of labor relations.

contention is wholly without merit for the reasons set forth immediately below.

The Act holds a labor organization responsible for the unfair labor practices of its agents just as it holds an employer answerable for the conduct of his agents. The test for determining such responsibility is the law of agency as it has been developed at common law.¹⁴ It is a familiar doctrine of agency that a principal is responsible for the acts of his agents done in furtherance of the principal's interest¹⁵ within the scope of the agent's general authority, even though the principal may not have authorized the acts in question, and may, in fact, even have forbidden them. It is enough if the principal had

¹⁴See House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 11; House Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess. p. 36; Senator Taft, Supplementary Analysis of the Act, 93 Cong. Rec. 6858-6859.

¹⁵The record is abundantly clear, and the undersigned finds, that Local 12 was opposed to entering into any bargaining contract which did not contain a union shop clause. This finding is supported by the credible testimony of Willard Shepherd who testified that during a conference in the spring of 1955, at which he, Bronson, Seymour, and Montgomery were present, Bronson stated that Local 12 was not interested in any contract not containing a union shop provision, adding that Local 12 had no other kind of bargaining contracts "on their books." The undersigned further finds that when Silcock requested, on August 2, 1956, Montgomery to enter into a union shop contract, he was carrying out one of the prime policies of Local 12.

empowered the agent to represent him in the area in which the agent acted.¹⁶

2. Respondent's activities at Brown-Bevis

In 1952, Local 12 won a Board-conducted election at Brown-Bevis.¹⁷ After negotiations no agreement on a bargaining contract was reached because, according to the credited testimony of Milton E. Schwartz, a partner in the present partnership of Brown-Bevis and a partner in its immediate successor, Brown-Bevis refused to bow to the demand of Local 12 to enter into a closed shop or a union shop agreement.

In August, 1954, Local 12, in conjunction with Teamsters Local 495, began picketing Brown-Bevis. The picketing, however, was not continuous but was spasmodically conducted for about a year.

As found by the Board in Case No. 21-RM-357 (114 NLRB No. 229), Local 12 and Teamsters Union 495, after consulting with the employees of Brown-Bevis and those of certain other employers engaged in kindred business, wrote, on May 11, 1955,

¹⁶In this regard, it is significant to note that during the Silcock-Montgomery conversation of August 2, the former stated that he had been informed by McNeel, "There is no reason in the world why [I] couldn't execute an agreement right now" provided Shepherd withdrew the pending unfair labor practice charges.

¹⁷The record also discloses that a Board-conducted election was also held at Brown-Bevis on December 31, 1954, which Local 12 lost.

Brown-Bevis and certain other employers for a meeting for the purpose of discussing a collective bargaining agreement; after receipt of said letters, said employers, including Brown-Bevis, filed separate representation petitions with the Board; between May 17 and May 20, 1955, said unions wrote the Board stating that they did not "claim to represent the majority of the employees" in the claimed units; that shortly after filing said disclaimers of interest, said unions requested the employers who had filed the above-referred-to petitions to sign collective bargaining contracts—but the unions' requests were denied; on May 31, 1955, Local 12 established picket lines at Brown-Bevis, and on various other dates at the plants of certain other employers for whom they had requested recognition; and at the hearing on aforesaid representation petitions (the petitions were consolidated for purpose of hearing, etc.) said unions disclaimed majority representation of the employees involved.

The Board further found in the aforementioned case that the disclaimers of interest filed by Local 12 and Teamsters 495, referred to above, cannot be given credence because, "The Unions disclaimed once when informed of the filing of the present representation petitions, and then almost immediately thereafter negated their disclaimers by demanding collective bargaining negotiations of the Employers. At the hearing the Unions disclaimed again. In the light of the whole record, it is plain that the Unions are playing 'fast and loose' * * *"

Pursuant to the Board's Decision, Order and Direction of Election in Case No. 21-RM-357 (114 NLRB No. 229), an election among Brown-Bevis employees was conducted on January 24, 1956, under the auspices of the Regional Director for the Twenty-first Region which the unions lost by a vote of 37 to 2. Despite the results of said election Local 12 continued to picket Brown-Bevis' premises and said picket line was still there at the time of the hearing herein.¹⁸

About a week after aforesaid election, Silcock inquired of Charles E. Skidmore, a Brown-Bevis partner, why Brown-Bevis could not "get together with the union and come to an agreement," adding that Brown-Bevis would be "much better off * * * if [it] would get together and sign a union agreement."¹⁹

The record as a whole establishes, and the undersigned finds, that at no time since the 1952 election has Local 12 receded from its demand for a union shop contract despite the fact that it well knew

¹⁸The picketing was continuous from the time it was commenced, May 13, 1955, except for a brief period in October, 1955, but the name of Teamsters Local 495 was deleted from the picket signs immediately after the January, 1956, election.

¹⁹The undersigned finds that when Silcock requested a "union agreement" he was referring to a union shop agreement for it was as found above, the policy of Local 12 to accept nothing less than union shop agreements. Furthermore, as found above, the 1952 negotiations broke down because Brown-Bevis refused to enter into a closed shop or a union shop agreement.

that since December 31, 1954, it did not represent the majority of Brown-Bevis' employees in a unit which the Board had found appropriate for the purposes of collective bargaining.

B. Concluding Findings

The General Counsel contended at the hearing and in his brief that since Local 12 was not the majority representative of the employees of Shepherd and of Brown-Bevis its picketing of the establishments of Shepherd and of Brown-Bevis had for its purpose, in violation of Section 8 (b)(1)(A) of the Act, the causing, forcing, or requiring said employers to recognize and deal with Local 12 as the majority representative of their respective employees in certain appropriate units and to enter into union shop agreements covering said employees. Respondent, on the other hand, contended that since the picketing was peaceful and the object thereof was nothing more than an endeavor upon the part of Local 12 to organize said plants, the activities and conduct of Local 12 in that regard were not violative of the Act.

Section 7 of the Act guarantees to employees the right, among others, to refrain from joining a union, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a)(3) of the Act. Section 8 (b)(1)(A) forbids labor organizations from restraining or coercing employees in the exercise of the rights guaranteed in Section 7.

It is clear from the various disclaimers of interest of majority representation filed by Local 12 with the Board during 1945, 1955, and 1956, and from the results of the various Board-conducted elections held in 1954-1956, that Local 12 for the past 2 years or so had not represented, and does not now represent, the employees of Shepherd and Brown-Bevis for the purposes of collective bargaining. It thus follows that Local 12's purpose of continuing the picket lines at Shepherd and Brown-Bevis after the employees involved had repudiated Local 12 at the polls was not to publicize the facts of a labor dispute but for the purpose of using its economic power to compel Shepherd and Brown-Bevis to bow to its demand for a contract containing a union shop provision. By such pressure Local 12 was in effect coercing Shepherd's and Brown-Bevis' employees in the exercise of certain rights guaranteed them by the Act in contravention of the public policy as embodied in Section 8 (b) (1) (A) of the Act.

The Supreme Court of the United States, within recent years, in cases involving facts similar to those now before us, has condemned the unlawful use of economic power by unions to compel employers to violate the law.²⁰ For example, in *Giboney*

²⁰Since the Act protects an employee's right to refrain from any and all forms of union activities, absent a valid union shop contract, the undersigned finds that Local 12's continuous picketing after being defeated at the polls by Shepherd's and Brown-Bevis' employees to be nothing but an attempt on

v. Empire Storage & Ice Co. (336 U.S. 490) and in other related cases,²¹ the Court held that picketing is something more than free speech and upheld, as constitutional, state injunctions of peaceful picketing which had been undertaken, as here, for unlawful objectives.

In *Giboney*, the Court upheld a state injunction against peaceful picketing which, as the Court had found, had as its purpose the forcing a company to violate a state statute. In so holding, the Court said (at page 503) “* * * it is clear that appellants were doing more than exercising a right of free speech or press * * * They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.”

In the *Gazzam* case, the employer had been asked by the union to sign a contract. None of the employees were members of the union. The employer answered that it was a matter for his employees to decide and gave the union permission to visit and solicit his employees. After meeting and polling the employees, the union was still unsuccessful in get-

the part of Local 12 to exert economic pressure upon Shepherd and Brown-Bevis in order to force them to coerce their respective employees into joining Local 12 in order to protect their jobs.

²¹*Building Service Union vs. Gazzam*, 339 U.S. 532; *Hughes, et al. vs. Superior Court*, 339 U.S. 460; *International Brotherhood of Teamsters vs. Hanke*, 339 U.S. 470.

ting a majority of adherents. The union then started to picket the employer's premises and the picketers carried signs "Unfair to organized labor." A second contract was offered by the union which provided that present employees not be required to join the union. This was refused by the employer for similar reasons. The picketing was enjoined by the Washington state courts as a violation of public policy against employer coercion of employees' choice of a bargaining representative as embodied in a state statute very similar in wording to Sections 7 and 8(a)(1) of the Act. The United States Supreme Court, relying on *Giboney*, upheld the injunction, stating at p. 540:

* * * Here, as in *Giboney*, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state. That state policy guarantees workers free choice of representatives for bargaining purposes. If respondent had complied with petitioners' demands and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative. (Emphasis supplied.)

The Court with reference to free speech said at p. 537:

But since picketing is more than speech and establishes a locus in quo that has far more po-

tential than inducing action or nonaction than the message pickets can convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.

Upon the record as a whole, the undersigned finds that the activities and conduct of Local 12, as epitomized above, even though it was in the form of picketing, was illegal restraint and coercion and hence violative of Section 8(b)(1)(A) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in Section III above, occurring in connection with the operations of Shepherd and Brown-Bevis, set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and, such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has violated Section 8(b)(1)(A), it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Union of Operating Engineers, Local Union No. 12, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By picketing certain establishments of Shepherd and of Brown-Bevis for the purpose of coercing and restraining the employees of said employers, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, it is recommended that International Union of Operating Engineers, Local Union No. 12, AFL-CIO, Los Angeles, California, its officers, representatives, agents, successors, and assigns, be ordered to:

1. Cease and desist from restraining or coercing the employees of Shepherd or of Brown-Bevis in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by a lawful agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Post at its offices in Los Angeles, California, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by representatives of Respondent, be posted immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by other material.

(b) Mail to the Regional Director for the Twenty-first Region copies of the notice attached hereto as Appendix, duly signed by the proper and qualified officers, for posting by Shepherd and Brown-Bevis, they being willing, in places where they customarily post notices to employees. Copies of said notices, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed as provided for above, be forthwith returned to the said Regional Director for Shepherd and Brown-Bevis' permissive posting.

(c) Notify the Regional Director for the Twenty-first Region, in writing, within twenty (20) days from the date of receipt of this Intermediate

Report and Recommended Order what steps it has taken to comply herewith.

It is further recommended that unless the Respondent within twenty (20) days from the receipt of this Intermediate Report and Recommended Order shall notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the aforesaid action.

Dated this 6th day of November, 1956.

/s/ HOWARD MYERS,
Trial Examiner.

Appendix

Notice

To All Members of International Union of Operating Engineers, Local Union No. 12, AFL-CIO

Pursuant to the Recommendations
of a Trial Examiner

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We Will Not restrain or coerce the employees of Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company, or of Charles E. Skidmore and Milton E. Schwartz, d/b/a Brown-

Bevis Industrial Equipment Co., or of any other employer over whom the National Labor Relations Board would assert jurisdiction, in the exercise of the rights guaranteed in Section 7 of the said Act, including the right to refrain from engaging in any or all of the activities guaranteed thereunder, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment made as authorized in Section 8(a)(3) of the Act.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL UNION No. 12, AFL-
CIO,

(Labor Organization)

By.....,

(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of District Court and Cause.]

RESPONDENT'S EXCEPTIONS TO
INTERMEDIATE REPORT

I.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Shep-

herd'' at line 48 on page 2, and ending with the word "Act" on line 3 of page 3, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

II.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In 1955" at line 22, page 3, and ending with the word "Board" on line 26, page 3, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

III.

Respondent excepts to that portion of the Intermediate Report beginning with the word "At" on line 28, page 3, and ending with the word "provisions" on line 31, page 3, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

IV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "On" on line 1, page 4, and ending with the word "No. 495" on line 4, page 4, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

V.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Despite" on line 15, page 4, and ending with the word "Shepherd" on line 17, page 4, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

VI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 19, page 4, and ending with the word "representative" on line 46, page 5, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

VII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In" on line 48, page 5, and ending with the word "August 2" on line 59, page 5, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

VIII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "So" on line 1, page 6, and ending with the word "acted" on line 37, page 6, for the reason that such findings and conclusions are not supported by substantial

evidence in the record considered as a whole, and are contrary to law.

IX.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 45, page 6, and ending with the word "Local 12" on line 55, page 6, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

X.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In" on line 56, page 6, and ending with the word "charges" on line 60, page 6, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In" on line 3, page 7, and ending with the word "agreement" on line 8, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In" on

line 10, page 7, and ending with the word "year" on line 12, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XIII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "As" on line 14, page 10, and ending with the word "involved" on line 31, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XIV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 33, page 7, and ending with the word "loose" on line 40, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Pursuant" on line 42, page 7, and ending with the word "herein" on line 48, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XVI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "About" on line 50, page 7, and ending with the word "agreement" on lines 53 and 54, of page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XVII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 58, page 7, and ending with the word "election" on line 61, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XVIII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 62, page 7, and ending with the word "agreement" on line 54, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XIX.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 1, page 8, and ending with the word "bargaining" on line 6, page 8, for the reason that such

findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XX.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 10, page 8, and ending with the word "Act" on line 21, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "It" on line 30, page 8, and ending with the word "Act" on line 44, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 46, page 8, and ending with the word "U. S. 490" on line 49, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXIII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Since"

on line 55, page 8, and ending with the word "jobs" on line 63, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXIV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Upon" on line 52, page 8, and ending with the word "Act" on line 55, page 9, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 4, page 10, and ending with the word "commerce" on line 10, page 10, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXVI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Having" on line 15, page 10, and ending with the word "material" on line 59, page 10, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXVII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Mail" on line 1, page 11, and ending with the word "action" on line 19, page 11, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

EXCEPTIONS TO RULINGS OF
THE TRIAL EXAMINER

At page 135 of the record, the Trial Examiner rejected an offer of proof by respondent in support of the respondent's question shown at page 134 of the transcript, as follows:

"Do you belong to an association of these equipment dealers?"

to which objection was sustained and an offer of proof made by respondent. The purpose was to show that the respondent was picketing the premises of the employer to inform the general public that the employer was anti-Labor. The respondent was barred by the Trial Examiner from introducing proof on this allegation which would have substantiated respondent's contention that the picketing was in support of its constitutional right of free speech and was not directed to coercing, restraining or intimidating the employees.

Further, the Trial Examiner erred at page 178 of the record by allowing proof to stand as to proposals

made by the Union. It has been the contention of the General Counsel that the Union had at all times insisted on a Union Security Agreement. Respondent contended that the proposals were in writing and, therefore, that the best evidence relating to any such contention as to any collective bargaining agreement should have been the agreements themselves. At page 178 of the record it was admitted by the employer that the proposals had been in writing. Thereupon respondent moved to strike all of the testimony as hearsay and was not the best evidence, inasmuch as the written proposals were not offered. This motion was denied.

Both of the foregoing rulings of the Trial Examiner were in error because they deprived the respondent of a full and complete hearing and also allowed the introduction of hearsay in violation of the rules of evidence.

For the foregoing reasons, respondent also excepts to the finding that a full and complete hearing was afforded the parties.

Respondent excepts to the findings on page 2 from the words "full opportunity" at line 31 to the word "issues" at line 33.

/s/ DAVID SOKOL,
Attorney for Respondent.

Received November 26, 1956.

[Endorsed]: No. 15810. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Union of Operating Engineers, Local Union No. 12, AFL-CIO, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed January 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15810

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL UNION No. 12, AFL-
CIO,

Respondent.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petition this Court for the enforcement of its order against Respondent, International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and its officers, representatives, agents, successors and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "International Union of Operating Engineers, Local Union No. 12, AFL-CIO and Willard W. Shepherd and Norma D.

Shepherd, d/b/a Shepherd Machinery Company, Case No. 21-CB-805” and “International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and Mrs. Edwin Selvin, an Individual, Case No. 21-CC-229.”

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on November 4, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, and its officers, representatives, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to aforesaid Respondent.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 34 (7)(a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and

other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, and its officers, representatives, agents, successors and assigns to comply therewith.

Dated at Washington, D. C., this 4th day of December, 1957.

/s/ STEPHEN LEONARD,
Associate General Counsel, National Labor Relations Board.

[Endorsed]: Filed December 6, 1957.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR
ENFORCEMENT

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The Respondent, International Union of Operating Engineers, Local Union No. 12, AFL-CIO, respectfully answers the Petition as follows:

(1) Respondent admits Paragraph (1) of the Petition that it is a labor organization.

(2) Respondent admits Paragraph (2) of the Petition.

(3) Respondent alleges that the Board's Order and Findings were not based upon any substantial evidence and further alleges that the Board failed to prove that it had jurisdiction to proceed.

Wherefore, Respondent prays this Honorable Court that the Petition for Enforcement be denied.

Dated this 11th day of December, 1957.

/s/ DAVID SOKOL,
Attorney for Respondent.

[Endorsed]: Filed December 16, 1957.

[Title of Court of Appeals and Cause.]

RESPONDENT'S STATEMENT OF POINTS
AND DESIGNATION OF PORTIONS OF
RECORD FOR PRINTING

To the Clerk of the Above-Entitled Court and to the
Petitioner, National Labor Relations Board:

The following is a concise statement of points on
which Respondent intends to rely herein:

Statement of Points

I.

The Board erred in finding that there was evidence to support the finding that Respondent violated the Act.

II.

The Board erred in its conclusion that the National Labor Relations Act as amended prohibited Respondent from engaging in peaceful picketing as shown by the evidence.

III.

The Board erred in finding that Respondent did not represent a majority of the employees of the companies involved.

IV.

The Board erred in finding that the peaceful primary picketing by Respondent restrained or coerced employees of the companies involved.

V.

The Board erred in finding it had jurisdiction herein.

Designation of Record for Printing

Respondent designates as necessary for the record the following:

All exhibits received and all evidence taken before the Board.

Dated: December 11, 1957.

/s/ DAVID SOKOL,
Attorney for Respondent.

[Endorsed]: Filed December 16, 1957.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON
BY THE BOARD AND DESIGNATION OF
PARTS OF THE RECORD NECESSARY
FOR THE CONSIDERATION THEREOF

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner herein, and pursuant to Rule 17(6) of the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding, and this designation of parts of the record necessary for the consideration thereof:

I.

Statement of Points

1. Substantial evidence on the record as a whole supports the Board's finding that respondent pick-

eted the plants of Shepherd Machinery Company and Brown-Bevis Industrial Equipment Company for the purpose of requiring said companies to recognize respondent as the bargaining representative of their respective employees, and to enter into collective agreements containing union security provisions with respondent, although at the time of the picketing respondent did not represent a majority of the employees of either company.

2. The Board properly held that respondent violated Section 8(b)(1)(A) of the National Labor Relations Act by the picketing described in point 1, above.

3. The Board's order entered in this case is valid and proper in all respects.

II.

Designation of Parts of the Record to Be Printed

A. The Board's Decision and Order dated November 4, 1957, including the Trial Examiner's Intermediate Report dated November 6, 1956.

B. Respondent's Exceptions to the Intermediate Report.

Dated at Washington, D. C., this 19th day of December, 1957.

/s/ STEPHEN LEONARD,
Associate General Counsel, National Labor Relations Board.

[Endorsed]: Filed December 23, 1957.

